

Linan v Freund

2018 NY Slip Op 33886(U)

March 27, 2018

Supreme Court, New York County

Docket Number: 111665/2009

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Sara Linan,

DECISION AND
ORDER

Plaintiff,

Index No.
111665/2009

- against -

Motion Seq. 3

Robert Freund, M.D., and Robert M. Freund, M.D., P.C.,

Defendants.

HON. EILEEN A. RAKOWER, J.S.C.

FILED
MAR 30 2018

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Sara Linan ("Linan") commenced county court action by summons and complaint on August 17, 2009 against defendants Robert Freund, M.D. ("Dr. Freund"), and Robert M. Freund, M.D., P.C. ("Freund P.C.") (collectively, "Defendants"). Linan alleges that Dr. Freund departed from accepted standards of medical practice in rendering plastic surgery services including abdominoplasty and breast augmentation care and treatment. Defendants interposed their Answer on September 29, 2009.

Presently before the Court is Defendants' Order to Show Cause for an order dismissing the complaint on the grounds that Linan has failed to provide Defendants with court ordered discovery in compliance with pre-trial orders dated January 31, 2017, July 18, 2017, September 26, 2017, November 14, 2017, February 13, 2018, and February 20, 2018; or precluding Linan from offering expert testimony or evidence at trial; or extending Defendants' time to disclose their experts pursuant to CPLR § 3101(d). Defendants submit the attorney affirmation of Daniel Wu ("Mr. Wu"), along with attached exhibits. No opposition has been submitted.

Based on Mr. Wu's affirmation, on September 29, 2009, Defendants served a demand for bill of particulars, a demand for total damages, demand for statements,

medical reports, authorizations, names and addresses of witnesses, photographs, and expert witness information pursuant to CPLR § 3101(d).

On September 30, 2016, Linan filed her Note of Issue. On January 31, 2017, a pre-trial conference was held and trial was scheduled for June 19, 2017. Pursuant to the pre-trial order, Linan was to exchange her expert disclosures pursuant to CPLR § 3101(d) no later than 45 days before trial. Defendants state that Linan failed to do so.

On July 18, 2017, a pre-trial conference was held and trial was set for October 23, 2017 due to Linan's failure to provide the outstanding discovery. Pursuant to the July 18, 2017 pre-trial order, Linan was to exchange her expert disclosures 30 days from the date of the Order. Defendants state that Linan failed to do so.

On November 14, 2017, another pre-trial conference was held and an order was entered. All parties agreed to the trial date of February 13, 2018. Linan was directed to respond to all outstanding discovery, including her expert disclosures within 30 days. Defendants state that Linan failed to do so.

On February 13, 2018, the parties appeared for another conference and entered another order. Trial was set for April 2018 and Linan was directed to exchange her expert disclosures by February 20, 2018. Defendants state that Linan failed to do so.

On February 20, 2018, another conference was held and an order was entered granting Linan to February 26, 2018 to exchange her expert disclosures. Trial was set for April 11, 2018.

In his affirmation, Mr. Wu avers that his office, to date, has not received any expert disclosures from Linan.

Linan does not oppose Defendants' motion.

Expert Disclosures

CPLR § 3101(d)(1)(i) states, in relevant part, that that “upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each is expected to testify, the substance of the facts and opinions on which each expert is expected to testify and the qualifications of each expert witness and a summary of the grounds for each expert’s opinion . . . In an action for medical . . . malpractice, a party, in responding to a request, may omit the names of medical . . . experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.”

“Expert medical testimony is the sine qua non for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause.” *Mercedes v. Farrelly*, 2012 NY Slip Op 31141(U), 9 (Sup. Ct.).

Trial courts have broad discretion in their supervision of expert disclosures under CPLR § 3101(d)(1)(i). *Rivera v. Montefiore Med. Ctr.*, 28 N.Y.3d 999, 1002 (2016). “A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party’s failure to comply with CPLR § 3101(d)(1)(i) is left to the sound discretion of the court.” *Rivera*, 27 N.Y.3d at 1002 (citations omitted).

“Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR § 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion.” *Martin v. Triborough Bridge & Tunnel Auth.*, 73 A.D.3d 481, 482 (1st Dept. 2010), *lv. denied* 15 N.Y.3d 713 (2010). “Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal.” *Haynes v. City of New York*, 45 N.Y.S.3d 387, 390 (1st Dept 2016).

CPLR § 3126 Standard

“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.” *Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 (1st Dept 2010). “Although actions should be resolved on the merits whenever possible, the efficient disposition

of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court's directives." (*id.*) Accordingly, CPLR § 3126 provides,

"If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regards to the failure or refusal as are just, among them: . . .

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of territory . . . or from using certain witnesses: or

3. an order striking out pleadings or parts thereof . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

"CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party's pleadings or outright dismissal of the action." *Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 (1st Dept 1998). "However . . . the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith." (*id.*) A "plaintiff's pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct . . ." *Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 (1st Dept 2017). Although Plaintiff may "tender a reasonable excuse to overcome defendants' showing of willfulness" (*Menkes v Delikat*, 50 NYS3d 318, 319 (1st Dept 2017), "failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the answer." *Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 (1st Dept 2011).

Discussion


To date, Linan has failed to provide Defendants with court ordered expert disclosures in violation of Pre-Trial orders dated January 31, 2017, July 18, 2017, September 26, 2017, November 14, 2017, February 13, 2018, and February 20, 2018. Linan's "pattern of noncompliance" with the court ordered discovery "supports an inference of willful and contumacious conduct . . ." and warrants the dismissal of the action. (*Jackson*, 147 A.D. 3d at 709). Additionally, Linan does not oppose Defendants' Order to Show Cause to dismiss the Complaint based on her failure to provide the court ordered discovery.

Wherefore, it is hereby

ORDERED that defendants Robert Freund, M.D., and Robert M. Freund, M.D., P.C.'s Order to Show Cause to dismiss the action based on plaintiff Sara Linan's failure to provide defendants with court ordered expert disclosures is granted without opposition, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: March 27, 2018


Eileen A. Rakover, J.S.C.

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