

**Jane Doe v Bivins**

2018 NY Slip Op 33903(U)

July 2, 2018

Supreme Court, New York County

Docket Number: 150400/2017

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

JANE DOE,

Plaintiff,

-against-

DEAN BIVINS

Defendant.

Index No.: 150400/2017

**DECISION/ORDER**

Motion Seq. 6

*Herrick, Feinstein, LLP*, New York (Mara B. Levin, Shivani Poddar, and Samuel Bazian of counsel), for plaintiff.

*Martin E. Karlinsky, Esq., Michael Flomenhaft, Esq.*, New York (Martin E. Karlinsky and Michael Flomenhaft of counsel), for defendant.

Gerald Lebovits, J.

Defendant, Dean Bivins, brings this CPLR 3124 motion to compel plaintiff, Jane Doe, to comply with outstanding discovery. Specifically, defendant seeks an order compelling plaintiff to produce medical authorizations and sworn responses to defendant's interrogatories. Defendant further seeks attorney fees incurred in filing the instant motion.

A preliminary conference was held on October 4, 2017. The court (Kenney, J.) ordered plaintiff to serve medical reports and authorizations. The court further ordered the parties to exchange names and addresses of all eyewitnesses and notice witnesses, statements of opposing parties, and photographs (initial disclosure). Lastly, the court ordered the parties to serve demands for discovery and inspection and interrogatories. The deadline to comply with these orders was November 3, 2017. The deadline to serve responses and objections to the discovery demands was December 15, 2017. (*See* NY St Cts Electronic Filing [NYSCEF] Doc No. 83, exhibit B.)

Defendant served his initial disclosure material, document demands, and interrogatories on November 3, 2017, in compliance with the preliminary conference order. Defendant also served document demands but failed to produce medical authorizations and her initial disclosures as required by the preliminary conference order.

Defendant served his responses and objections to Doe's document demands on December 15, 2017. Plaintiff served her initial disclosure but failed to produce medical authorizations and all the information required in the initial disclosure, namely, the names and addresses of all eye witnesses and notice witnesses and statements of opposing parties. Plaintiff served her responses and objections to defendant's document demands on December 18, 2017. The next day, plaintiff served responses and objections to defendant's interrogatories.

The parties appeared for a compliance conference on December 20, 2017. The court ordered plaintiff to produce medical authorizations by January 15, 2018, and to produce documents responsive to outstanding document demands. Plaintiff provided 16 pages of her chiropractor's records. Plaintiff further included 13 audio recordings, one video recording, and six photographs of her alleged injuries – all produced without metadata. She has also only provided one authorization to obtain records from one chiropractor, despite alleging in the complaint that she received treatment from multiple providers, therapists, and counseling.

On January 31, 2018, defendant served over 9000 documents, while plaintiff served only 134 documents, again without any metadata. Plaintiff further failed to provide any additional medical authorizations, or supplement her interrogatory responses.

The parties appeared for a second compliance conference on February 28, 2018. The court ordered plaintiff to produce all remaining medical authorizations by March 14, 2018. The court further ordered the parties to serve further documents and to supplement their responses and objections to document demands and interrogatories by March 30, 2018. Plaintiff has not complied with any of these orders.

Plaintiff offers no excuse for not providing medical authorizations. She further failed to respond to interrogatories seeking information on what medical attention she sought in connection to her sustained injuries. As to the authorizations, she merely states that there are no further authorizations to provide. This contradicts her complaint in which she alleged she sought multiple medical providers, therapists, and counseling. (See NY St Cts Electronic Filing [NYSCEF] Doc No. 82, exhibit A, ¶ 36.) Further, not providing authorizations is a direct refusal to comply with the court's conference orders. Plaintiff must provide further medical authorizations or an affidavit stating that she sought treatment only from the one provider that she has already provided a medical authorization. She must also supplement her response to interrogatories numbered 21 and 22. They seek relevant information about the medical attention she sought.

Plaintiff's excuse for not providing metadata is that she "possesses neither the technical proficiency to produce such metadata nor the resources to retain a forensic technological expert to pursue a search for the metadata." (See NY St Cts Electronic Filing [NYSCEF] Doc No. 100, Karlinsky aff, ¶ 10.) This is not a meritorious excuse. "[T]he producing party [is required] to bear the initial cost for searching for, retrieving and producing discovery...." (*U.S. Bank Nat Ass'n v GreenPoint Mortgage Funding, Inc.*, 94 AD3d 58, 63 [1st Dept 2012].) While the First Department recognized that sometimes it is proper to shift costs, plaintiff has not shown that it would be proper in this case. Plaintiff must produce metadata for her responsive documents.

Plaintiff must produce documents responsive to defendant's document demands. It is improper to state that "she will produce all relevant, non-privileged documents in her possession, if any, that are responsive." Plaintiff must either produce documents responsive to the document demands or state that no such documents exist.

As to the document demands to which plaintiff objects, demands numbered 52-57, plaintiff must provide responsive documents. The objections were not proper as the documents

requested are material and necessary to the nature of the claims. If such documents are privileged, plaintiff must provide a privilege log.

Plaintiff must respond to defendant's interrogatory requests numbered one and four. The former seeks identifying information on anyone who has knowledge material and relevant to this matter. The latter seeks information identifying everyone with whom plaintiff communicated with relating to the subject matter of the case. These are proper interrogatories, and plaintiff's objections were improper. Plaintiff must either supplement these responses or state that no such other individuals exist.

Plaintiff must respond to interrogatory request number 17. This request seeks the basis of plaintiff's claim under New York's Victims of Gender-Motivated Violence Protection Act. She must state the basis for the claim. If the basis of the claim is text messages or photographs, then she must produce those images or messages. If no such images or messages exist, she must state that they do not exist.

ORDERED that defendant's motion to compel is granted to the extend provided below:


Plaintiff must provide within 15 days medical authorizations, medical records, or an affidavit stating that she has not sought medical attention outside of the authorization she has already provided. Plaintiff must comply.

Plaintiff must supplement within 15 days her responses to defendant's interrogatories. Plaintiff is not required to answer interrogatories numbered 8-10, 12-13, and 15, which ask about her Orthodox-Jewish background.

Plaintiff must identify and provide within 15 days contact information for those individuals who have knowledge of the subject matter of this action.

Plaintiff must produce within 30 days further responsive documents, including emails, text messages, and photographs, and metadata. Plaintiff must state with particularity those documents that she does not possess or that she cannot obtain. If plaintiff claims documents are privileged, she must provide a privilege log.

Dated: July 2, 2018

J.S.C. 

**HON. GERALD LEBOVITS**  
J.S.C.