

**Anderson v Singh**

2018 NY Slip Op 34038(U)

September 13, 2018

Supreme Court, Westchester County

Docket Number: 58229/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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  
MAXINE BENT ANDERSON and HEATHER BENT-TAMIR,

Plaintiffs,

-against-

**DECISION and ORDER**

**Index No. 58229/2016**

**Motion Date: Aug. 13, 2018**

**Seq. Nos. 2 & 3**

GURMEET SINGH, NISHAN SINGH, BERNARD MORCHELES, and JOHN DOES 1-5, (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on plaintiffs' motion (Seq. No. 2) for an order striking the answer of defendant Bernard Morcheles pursuant to CPLR 3126(3) and proceeding to damages only, or, in the alternative, precluding defendant Bernard Morcheles from ever testifying at any hearing or trial or providing any documentation or affidavits in support of his defense, and granting such other and further relief as may be just, proper and equitable.

- Order to Show Cause; Affirmation in Support of Peter DeFilippis; Exhibits A-M;  
Certificate of Merit<sup>1</sup>
- Affirmation in Opposition of Debora J. Dillon; Exhibits A-E
- Affidavit of Service

<sup>1</sup> Plaintiffs subsequently uploaded additional documents on August 8, 2018. As the deadline for plaintiffs to provide documents to the court was July 10, 2018 (Pl. Ex. M in Seq. 2), the additional documents have not been considered.

## NYSCEF File

The following papers were read on the motion of defendant Bernard Morcheles (Seq. No. 3) for a) a protective order against disclosure of his medical records, b) an order dismissing plaintiffs' complaint with prejudice pursuant to CPLR 3126, or, in the alternative, precluding plaintiffs from offering any evidence on the issue of damages, or, in the alternative, compelling plaintiffs to provide all discovery demanded in his post-deposition notices to produce dated March 20, 2017 and March 29, 2017, c) an order modifying the April 5, 2018, April 27, 2018, May 30, 2018, and June 21, 2018 Compliance Conference Orders so as to include a directive contained in the February 22, 2018 and March 1, 2018 Compliance Conference Orders, and d) such other and further relief as the court may deem just and proper.

Order to Show Cause; Affirmation in Support of Debora J. Dillon; Exhibits A-G  
Affirmation in Opposition of Peter DeFilippis; Exhibit List; Exhibits A-L; Certificate  
of Merit  
Affidavit of Service  
NYSCEF File

Upon the foregoing papers and the proceedings held on August 13, 2018, these motions are determined as follows:

**Factual and Procedural Background**

Plaintiffs commenced this action to recover damages for personal injuries allegedly stemming from a 2013 automobile accident by the filing of a summons and verified complaint on or about May 7, 2015 (Pl. Ex. A in Seq. 2). At the time of the accident, plaintiffs were back seat passengers in a taxi cab that was allegedly rear-ended by defendant Bernard Morcheles. Morcheles served a verified answer dated June 9, 2015 (Pl. Ex. B in Seq. 2). Defendants Gurmeet Singh and Nishan Singh (the Singh defendants) served a verified answer dated June 11, 2015 (NYSCEF Doc. No. 9).

By compliance conference order dated January 23, 2017 (Pl. Ex. E in Seq. 2), defendants were directed to appear for depositions on March 25, 2017. By compliance conference orders dated February 21, 2018 and February 28, 2018 (Pl. Exs. F & G in Seq. 2), defendants were directed to appear for depositions on March 28, 2018 and March 29, 2018. Morcheles did not comply with these directives.

Based on representations made by Morcheles' counsel during the compliance conference held on April 5, 2018, the court issued the following directive: "At the next compliance conference, counsel for defendant Morcheles shall provide a **detailed update** (with supporting documentation) with respect to his ability to appear for a deposition" (Pl. Ex. H in Seq. 2 [emphasis in original]). The next conference was held on April 27, 2018. Thereafter, the court issued the following directive: "At the next compliance conference, counsel for defendant

Morcheles shall provide a **further detailed update** (with supporting documentation) with respect to his ability to appear for a deposition. Depending on the nature of the update, plaintiff may be issued a briefing schedule” (Pl. Ex. I in Seq. 2 [emphasis in original]).

On May 16, 2018, plaintiffs’ counsel sent an e-mail to Morcheles’ counsel requesting information concerning Morcheles’ ability to appear for a deposition (Pl. Ex. J in Seq. 2). Plaintiffs’ counsel sent a follow up e-mail on June 19, 2018 (Pl. Ex. L in Seq. 2).<sup>2</sup>

A compliance conference was next held on May 30, 2018. According to Morcheles’ counsel, at that time she notified the court and all other counsel that Morcheles’ treating physician “had advised that he would not involve himself in any litigation and that in view of same and [Morcheles’] health, counsel for [Morcheles] would sign a stipulation precluding [Morcheles] from testifying in this action” unless Morcheles appeared for a deposition sufficiently in advance of the trial date (Def. Aff. In Opp. ¶¶23-24). The order stemming from that conference states, inter alia, that “[a]t the next compliance conference, the parties shall state whether they have executed a preclusion stipulation with respect to defendant Morcheles” (Pl. Ex. K in Seq. 2). As of the June 21, 2018 compliance conference, no preclusion stipulation had been executed.

### **The Morcheles Deposition Dispute**

Pursuant to a briefing schedule dated June 21, 2018 (Pl. Ex. M in Seq. 2), plaintiffs now seek an order striking Morcheles’ answer, or, in the alternative, an irreversible preclusion order. They contend that Morcheles has failed to appear for three court-ordered depositions and failed to obey two court orders directing him to provide documentation relevant to his medical condition and ability to testify. Plaintiffs reason that Morcheles’ behavior can properly be characterized as wilful and contumacious and that his answer should be stricken pursuant to CPLR 3126(3) as a result. In the alternative, plaintiffs contend that an irreversible preclusion order should be granted pursuant to CPLR 3126(2), precluding Morcheles from ever testifying at any hearings or at trial, and further precluding him from offering any documentation or affidavits in support of his defense.

In opposition, Morcheles asserts that plaintiffs improperly seek disclosure of his privileged medical records. He also cross-moves for a protective order with respect to his medical records. Morcheles contends that because he has not placed in controversy his medical condition at the time of the subject accident, he has not waived the physician-patient privilege and his medical records are immune from disclosure. He also notes that prior to the filing of plaintiffs’ motion, he had expressed willingness to enter into a conditional preclusion stipulation.

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<sup>2</sup> Although plaintiffs’ motion papers indicate that neither e-mail was responded to (Pl. Aff. In Supp. ¶36), Morcheles’ opposition papers reflect that several reply e-mails were in fact sent (Def. Exs. C & E in Seq. 2). It is undisputed, however, that neither of plaintiffs’ counsel’s e-mails resulted in Morcheles’ provision of medical documentation.

According to Morcheles' motion papers, "[n]ow, years after the occurrence of the subject motor vehicle accident, [he] has unfortunately contracted a disease that affects the functioning of his brain and he has been unable to appear for deposition by reason of same" (Def. Aff. In Opp. ¶13). He asserts that in light of his unspecified disease, his failure to appear for depositions is neither wilful nor contumacious. The motion papers further state that an unnamed relative of Morcheles contacted Morcheles' attorney on April 5, 2018 and informed her that Morcheles "is no longer living independently, due at least in part to his health, and that he is living with his daughter and her husband in Maryland" (Def. Aff. In Opp. ¶16). Morcheles also asserts that his attorney provided medical documentation solely for the court's review during the April 27, 2018 conference and that the court was "satisfied" with this documentation (Def. Aff. In Opp. ¶18). In addition, he claims that the court advised plaintiffs' counsel during the May 30, 2018 compliance conference that under the circumstances of this case, "the appropriate remedy ... would be to preclude [Morcheles] from testifying at trial, unless he appears for deposition a reasonable amount of time before trial" (Def. Aff. In Opp. ¶40).<sup>3</sup>

During oral argument, Morcheles' counsel acknowledged that she has received no written communication from Morcheles' physician specifying that Morcheles cannot appear for a deposition, and reiterated that no such communication would be forthcoming (Oral Argument (OA) Tr. 3-5). She also informed the court that she was advised by "[Morcheles'] family that he lives with currently that he is not incompetent. He has a disease that is [a]ffecting the functioning of his brain" (OA Tr. 5). More specifically, Morcheles' counsel stated that her client's "ability to accurately recall and accurately relate past events is very much [a]ffected" (OA Tr. 6).

Plaintiffs' counsel argued that "all we really have is Defense counsel's speculation about what may or may not be wrong with the functioning of Mr. Morcheles' brain. All of this about his loss of memory and things like that, that just seems to be thinking out loud. There is no medical back up for that, there is no medical information that has been exchanged with Plaintiff[s'] counsel" (OA Tr. 8). He asserted that "[t]here has to be proof to support this otherwise in every case if you don't want your client to testify, you could just simply say he is medically unable to do so and just take my word for it" (OA Tr. 9). Plaintiffs' counsel also expressed willingness to conduct Morcheles' deposition by Skype or by telephone in the event that Morcheles is unable to travel (OA Tr. 9). He characterized Morcheles' testimony as important, stating, "I have two passengers in the back seat of a taxi, that was rear ended by Mr. Morcheles apparently with no excuse. His testimony, this is the main testimony in the case. For all purposes including Motions for Summary Judgment and Trial, to excuse him at this point

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<sup>3</sup> Morcheles further argues that plaintiffs' motion must be denied because plaintiffs failed to annex a good faith affirmation pursuant to 22 NYCRR 202.7. Under the circumstances of this case, it is apparent that although no separate good faith affirmation was appended to plaintiffs' motion, this failure can be excused in light of other documentation submitted by plaintiffs establishing their efforts to resolve this dispute without motion practice (*see Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490 [1st Dept 2011]).

without any medical excuse, I think it is a willful attempt to not produce him to gain the advantages that come with these preclusion orders”<sup>4</sup> (OA Tr. 12). Lastly, with respect to the medical documentation that was shown only to the court by Morcheles’ counsel during a compliance conference, plaintiffs’ counsel observed that “[a]pparently, the Court was not satisfied by it because they continued to order that more medical documentation be provided in two separate orders and that has been ignored” (OA Tr. 11; *see also* OA Tr. 17).

The court observes that the testimony of Morcheles, who is a party, is clearly relevant to this action. Morcheles has provided no actual evidence that he cannot appear for a deposition, and as plaintiffs correctly observe, they are not required to simply take Morcheles at his word. Moreover, while Morcheles cites numerous cases such as *Koump v Smith* (25 NY2d 287 [1969]) for the proposition that a defendant need not provide medical records unless defendant’s medical condition is “in controversy,” these cases are irrelevant to the instant motions. The issue at hand is whether Morcheles may avoid appearing for a deposition without providing sufficient documentation to support his claim that he is too ill to appear. The claim that the court was “satisfied” with whatever was produced at the April 27, 2018 conference is clearly belied by the fact that the compliance conference order issued immediately thereafter contains a directive for Morcheles to provide “a **further detailed update** (with supporting documentation) with respect to his ability to appear for a deposition,” and a warning that “[d]epending on the nature of the update, plaintiff may be issued a briefing schedule” (Pl. Ex. I in Seq. 2 [emphasis in original]).

*Dragotta v Southampton Hospital* (2001 NY Slip Op 40471[U] [Sup Ct, Suffolk County 2001]) is instructive. The *Dragotta* plaintiffs moved for an order striking the answer of defendant Leonard Leonardi due to his failure to appear for a deposition, and Leonardi cross-moved for a protective order. Leonardi’s counsel presented an unsworn statement from a physician stating that a psychiatric condition precluded Leonardi from appearing at a deposition. The Supreme Court deemed the statement insufficient, and also deemed deficient a subsequently filed physician’s affirmation. The *Dragotta* court further noted that as a party defendant, Leonardi’s testimony was “not only relevant but necessary before this matter can go to trial,” and that there was no proof that Leonardi was incompetent. Accordingly, the court denied the motion for a protective order, directed Leonardi to appear for a deposition on a date certain, and further ordered that if Leonardi failed to appear, Leonardi’s counsel “must provide the Court and the attorneys for all parties with an affidavit from Dr. Leonardi’s physician with a diagnosis of Dr. Leonardi’s medical condition and a specific explanation why this condition prevents his appearance at a deposition at this time.” The Second Department affirmed, concluding that “[t]he Supreme Court providently exercised its discretion in granting that branch of the plaintiffs’ motion which was to compel the appellant to submit to an examination before trial, and in denying his cross motion for a protective order” (*Dragotta v Southampton Hosp.*, 295 AD2d 557 [2d Dept 2002]).

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<sup>4</sup> Based on context, it appears that plaintiffs’ counsel was referring to conditional preclusion orders as opposed to irreversible preclusion orders. Morcheles’ counsel disputed plaintiffs’ counsel claim that a preclusion order would be beneficial to Morcheles (OA Tr. 13).

Similarly, here, it is apparent that Morcheles has not provided sufficient information to justify his failure to appear for a deposition, and he is not entitled to a protective order with respect to his medical records. In light of the foregoing, Morcheles must take one of the following steps: 1) appear in Westchester County, New York for an in person deposition on a date certain; 2) provide the court and the attorneys for all other parties with a physician's affidavit<sup>5</sup> reflecting that he cannot appear in person for a deposition but may appear by other means (such as telephonically), and then appear for the deposition on a date certain and pay for any costs associated with the alternative method of conducting the deposition; or 3) provide the court and the attorneys for all other parties with a physician's affidavit providing a diagnosis of Morcheles' medical condition and a specific explanation for why this condition prevents his appearance at a deposition of any nature at this time.

In the event that Morcheles chooses the third option, the court shall issue a preclusion order stating that Morcheles is precluded from testifying, at trial or otherwise, and should he appear for a deposition sufficiently in advance of the trial date, he may move to vacate the order of preclusion.<sup>6</sup> However, in the event that Morcheles does not appear for a deposition and does not provide a physician's affidavit, he will have failed to give a reasonable excuse for his noncompliance with this court's multiple directives to appear for a deposition. Under such circumstances, plaintiffs will be entitled to an order striking Morcheles' answer (*see Sadoyan v Castro*, 102 AD3d 666 [2d Dept 2013] [observing that where defendant "failed to appear for a court-ordered deposition on three separate dates over a nine-month period" and "failed to substantiate a reasonable excuse for those failures," "the Supreme Court did not improvidently exercise its discretion in conditionally striking [defendant's] answer"]); *see also Hassan v Executive Towers At Lido, LLC*, 29 Misc 3d 131[A] [App Term 2010] [affirming a District Court's order denying defendants' motion to vacate a default judgment, where "defendants did not submit sworn proof detailing why defendant Fried was, for medical reasons, unable to appear on the adjourned trial date"]).

### *The Paper Discovery Dispute*

Next, Morcheles claims that after plaintiffs failed to comply with directives in two court orders to respond to his post-deposition discovery demands, the court attorney-referee mistakenly failed to direct plaintiffs' compliance in four subsequent orders. He seeks substantial relief, including modification of various compliance conference orders.

Morcheles' contentions are without merit. By Morcheles' counsel's own admission,

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<sup>5</sup> In the event that Morcheles' treating physician is unwilling to provide the required affidavit, it is recommended that Morcheles seek same from a different physician.

<sup>6</sup> Notwithstanding Morcheles' contrary intimation, there is no evidence in the record that the court previously informed the parties that a conditional preclusion order would be issued *in the absence of appropriate medical documentation provided to all parties*.

during the April 5, 2018 compliance conference she did not inform the referee that any discovery requested of plaintiffs remained outstanding. Rather, she was unprepared to answer the question posed by the court (Def. Aff. In Supp. ¶41). As it is incumbent upon counsel to advise the court as to whether further discovery is needed, and Morcheles' counsel admittedly failed to do so, court intervention was no longer warranted. The compliance conference order uploaded the following day therefore omitted any reference to the now allegedly overdue discovery (Pl. Ex. H in Seq. 2). Morcheles' counsel made no effort to contact the court within a reasonable time frame thereafter to attempt to correct the purported mistake. Notably, although two documents were uploaded to NYSCEF on April 6, 2018 by Morcheles' counsel (NYSCEF Doc. Nos. 121 & 122), the documents are not addressed to any court personnel. Moreover, no immediate conference was requested by Morcheles' counsel to attempt to address the court's alleged error.

Indeed, more than three weeks passed before Morcheles' counsel next appeared before the court on this matter. At that April 27, 2018 conference, the referee again deemed the discovery issue resolved, and the order uploaded three business days later accordingly did not include any directive for plaintiffs to respond to the post-deposition discovery demands at issue on this motion (Pl. Ex. I in Seq. 2). Once again, Morcheles' counsel did not seek a "correction" of the allegedly deficient order, notwithstanding Morcheles' current contention that he is missing purportedly vital discovery. In fact, it was only after four separate compliance conferences were conducted between early April and late June 2018 (several of which resulted in orders unequivocally stating that "[d]efendants,<sup>7</sup> having belatedly raised discovery issues that could and should have been brought to the Court's attention in early April 2018," were "advised that these issues will not delay the issuance of a trial readiness order" (Pl. Exs. H & K in Seq. 3)), and only after plaintiffs' counsel requested a briefing schedule to address the issue of Morcheles' failure to appear for court-ordered depositions, that Morcheles' counsel determined that motion practice was necessary to resolve the issue of allegedly outstanding paper discovery.

Morcheles was warned in each compliance conference order that "disclosure demands not raised at the Compliance Conference are deemed waived." Assuming *arguendo* that he did not waive his right to judicial enforcement of the post-deposition discovery demands at issue when his counsel attended the April 5, 2018 conference unprepared to conduct a meaningful discussion, he most assuredly waived it later by waiting nearly a month to claim that the discovery remained overdue, and then waiting until numerous additional court orders were issued before determining that plaintiffs' failure to serve responses warranted the relief requested. Accordingly, all remaining branches of Morcheles' motion are denied (the court having earlier denied that branch of the motion which was for a protective order as to Morcheles' medical records).

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<sup>7</sup> Even though the compliance conference orders expressly refer to "defendants" collectively, Morcheles claims that the unqualified term "defendants" actually refers only to the Singh defendants (Def. Aff. In Supp. ¶45). A review of the orders reflects that the court consistently uses the term "defendant Morcheles" when referring to that defendant, to "the Singh defendants" when referring to those defendants, and to "defendants" when referring to all defendants. Morcheles' contention is wholly without merit.

*Additional Concerns*

Lastly, the court notes that despite repeated warnings, plaintiffs' counsel and counsel for Morcheles continue to air their numerous disputes through e-mail and NYSCEF correspondence. Those parties are directed to the Differentiated Case Management (DCM) Protocol, which states: "Inquiries submitted via the NYSCEF system or by email to the CP [Compliance Part] are restricted to scheduling matters and routine submissions only. The CP will not entertain requests to extend court-ordered discovery deadlines by e-mail or filed requests **or respond to discovery disputes submitted via e-mail or the NYSCEF system.** If assistance is required in regards to a discovery issue, the parties shall request a compliance conference in a timely manner" (DCM Protocol Part II.A. [emphasis added]). The parties are further advised that future breaches of the DCM Protocol will not be tolerated.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is hereby:

ORDERED that the branch of plaintiffs' motion which is for an order striking defendant Morcheles' answer is granted unless: 1) defendant Morcheles appears for a deposition in person in Westchester County, New York on October 15, 2018; 2) defendant Morcheles supplies a physician's affidavit to counsel for all other parties and to the court no later than October 9, 2018 stating that he cannot appear in person for a deposition but may appear by other means, and then appears for the deposition on October 15, 2018 and pays for any costs associated with the alternative method of conducting the deposition; or 3) defendant Morcheles supplies a physician's affidavit to counsel for all other parties and to the court no later than October 15, 2018 providing a diagnosis of his medical condition and a specific explanation for why this condition prevents his appearance at a deposition of any nature at this time; and it is further,

ORDERED that in the event that defendant Morcheles fails to comply with any of the three directives specified above, plaintiffs shall upload to the NYSCEF website, no later than October 22, 2018, a detailed affidavit/affirmation of noncompliance and a proposed order striking defendant Morcheles' answer, upon notice to all parties; and it is further

ORDERED that in the event that defendant Morcheles supplies a physician's affidavit to counsel for all other parties and to the court no later than October 15, 2018 providing a diagnosis of his medical condition and a specific explanation for why this condition prevents his appearance at a deposition of any nature at this time, the court shall issue a conditional preclusion order no later than October 31, 2018; and it is further,

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

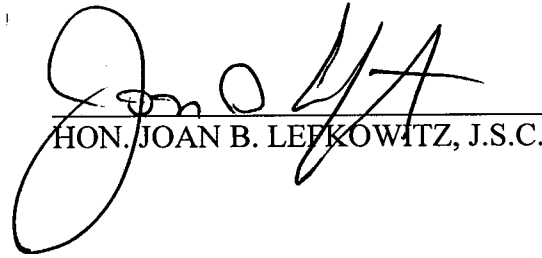
ORDERED that the motion of defendant Morcheles is denied in its entirety; and it is further;

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on October 24, 2018 at 10:30 a.m.; and it is further;

ORDERED that plaintiffs shall serve a copy of this Decision & Order, with notice of entry, upon all defendants within five days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York  
September 13, 2018



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

To:

All Counsel Via NYSCEF

cc: Compliance Part Clerk