

Campo v Dialysis Clinic, Inc.
2018 NY Slip Op 34160(U)
June 1, 2018
Supreme Court, Rockland County
Docket Number: Index No. 034136/2016
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
RAYMOND SAL CAMPO,

Plaintiff,

-against-

DIALYSIS CLINIC, INC. DR. MILITZA KIROYCHEVA,
STATEN ISLAND UNIVERSITY HOSPITAL and
"JOHN DOE, M.D." (names fictitious, identify
unknown, being sued herein as "JOHN DOE,
M.D."),

Defendants.

-----X
Sherri L. Eisenpress, A.J.S.C.

DECISION AND ORDER

Index No. 034136/2016

(Motions # 1, 2 and 3)

The following papers, numbered 1 to 12, were considered in connection with (i) Defendant Staten Island Hospital's motion for an Order, pursuant to Civil Practice Law and Rules § 3126, dismissing Plaintiff's action for failing to provide a Bill of Particulars and pertinent discovery, or in the alternative, precluding plaintiff from providing discovery or testimony at the time of trial; (ii) Defendant Dialysis Clinic, Inc's motion for an Order, pursuant to Civil Practice Law and Rules § 3126, dismissing Plaintiff's action for failing to provide a Bill of Particulars and pertinent discovery, or in the alternative, precluding plaintiff from providing discovery or testimony at the time of trial; and (iii) Defendant Militza Korycheva, M.D's cross-motion, pursuant to Civil Practice Law and Rules § 3126, dismissing Plaintiff's action for failing to provide a Bill of Particulars and pertinent discovery, or in the alternative, precluding plaintiff from providing discovery or testimony at the time of trial, or in the alternative, compelling Plaintiff to comply with all outstanding demands:

PAPERS

NUMBERED

Motion #1

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIRMATION OF
GOOD FAITH/EXHIBITS "A-F"

1-3

AFFIRMATION IN OPPOSITION/EXHIBITS "A-C"

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Motion #2

NOTICE OF MOTION/AFFIRMATION OF GOOD FAITH/AFFIRMATION IN SUPPORT/ EXHIBITS "A-G"	5-7
AFFIRMATION IN OPPOSITION/EXHIBITS (A-C)	8
AFFIRMATION IN REPLY	9

Motion #3

NOTICE OF CROSS-MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A"	10
AFFIRMATION IN OPPOSITION/EXHIBITS "A-C"	11
AFFIRMATION IN REPLY	12

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiff commenced this medical malpractice action with the filing of a Summons and Verified Complaint on September 30, 2016. Issue was joined with the filing and service of Defendant Dialysis Clinic's Answer on November 28, 2016, Defendant Staten Island University Hospital's Answer on November 30, 2016, and Defendant Kiroycheva's Answer on February 27, 2017. Each defendant served discovery demands, including a demand for a Verified Bill of Particulars, at the time they interposed their answers. Thereafter, defendants assert that they sent various follow-up letters requesting a response to their demands but Plaintiff failed to comply. Plaintiff opposes the various motions and states that the motions are moot, as he provided Verified Bills of Particular in response to the motions, as well as authorizations to obtain Plaintiff's records. In reply, while Defendants acknowledge that Plaintiff has provided this discovery, they assert that Court intervention is still required, as there remain some outstanding authorizations.

Pursuant to Civil Practice Law and Rules § 3126:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed

- resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The Court has broad discretion in making determinations concerning matters of disclosure including the nature and degree of the penalty to be imposed under Civil Practice Law and Rules § 3126. [*Stone v. Zinoukhova*, 119 A.D.3d 928 (2d Dept. 2014); *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812 (2d Dept. 2013); *Raville v. Elnomany*, 76 A.D.3d 520 (2d Dept. 2010)]. The striking of a pleading may be appropriate where the movant has made a clear showing that the failure to comply with the discovery demands is willful or contumacious. [*Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812 (2d Dept. 2013)]. Further, the Court can infer that a party is acting willfully or contumaciously through repeated failures to respond to demands or to comply with discovery orders, coupled with inadequate explanations for the failure to comply. [*Stone v. Zinoukhova*, 119 A.D.3d 928 (2d Dept. 2014); *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812 (2d Dept. 2013)]. However, public policy favors the resolution of cases on their merits, and the drastic remedy of striking a pleading should not be imposed unless the failure to comply is clearly willful and contumacious. [*Stone v. Zinoukhova*, 119 A.D.3d 928 (2d Dept. 2014)].

On the record before the Court, the request to dismiss Plaintiff's Complaint and/or preclude him at the time of trial must be denied as Plaintiff's actions do not warrant such a drastic remedy at this point in time. While the Court agrees that Plaintiff failed to provide Verified Bills of Particular and authorizations for an inexcusable, lengthy amount of time, and that no satisfactory excuse has been offered for the delay, at present, Plaintiff has largely

complied with Defendants' discovery demands. Additionally, Defendants could have filed for a Preliminary Conference and/or moved to compel discovery responses sooner, rather than resort to a motion to dismiss the Complaint as the first resort. The Court is scheduling this matter for a Preliminary Conference before the undersigned on **FRIDAY, JUNE 15, 2018 at 9:45 a.m.**, at which time the Court will set down a schedule to conduct the remainder of discovery on an expedited basis.

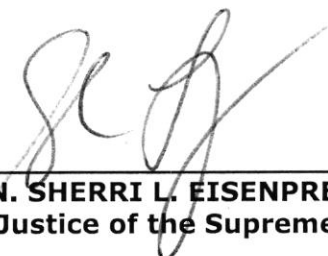
Accordingly, it is hereby

ORDERED that Defendants' motions for an Order dismissing Plaintiff's Complaint or precluding him at the time of trial are denied; and it is further

ORDERED that this matter is scheduled for a status conference before the undersigned on **FRIDAY, JUNE 15, 2018 at 9:45 a.m.** Plaintiff should be prepared to file its Note of Issue on that date.

The foregoing constitutes the Decision and Order of this Court on Motions #1, #2 and #3.

Dated: New City, New York
June 1, 2018



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

(e-filed -)

All parties