

Rolfs v Medina

2018 NY Slip Op 34239(U)

February 5, 2018

Supreme Court, Westchester County

Docket Number: Index No. 59515/2017

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
MELINDA L. ROLFS,

Plaintiff,

-against-

JOSEPH MEDINA and ARILEYDA M. ORTIZ,

Defendants.
-----X

DECISION & ORDER

Index No.: 59515/2017

Motion Date: Feb. 5, 2017

Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order pursuant to CPLR 3124 and 3126 compelling plaintiff to appear for an examination before trial and for an order pursuant to CPLR 8106 directing plaintiff to pay the costs and fees for making this motion.

Order to Show Cause - Affirmation in Support - Exhibits A - D
Affirmation in Opposition - Exhibits A - E

Upon the foregoing papers and the proceedings held on February 5, 2018, this motion is determined as follows:

This action arises out of the occurrence of an automobile accident on or about April 23, 2017. Plaintiff initiated this action by filing a summons and complaint on June 23, 2017. The defendants interposed an answer on or about August 1, 2017, and issue was joined. Thereafter, on September 20, 2017, the parties entered into a Preliminary Conference Stipulation which this court so-ordered on September 19, 2017. Pursuant to this Order, the parties were to be deposed on November 30, 2017. However, the depositions did not go forward.

According to defendants, preparation for the examinations before trial revealed that counsel had not yet obtained from plaintiff's medical providers any of the records regarding plaintiff's treatment for injuries allegedly sustained in the subject automobile accident. Defendants then sought a postponement of the depositions to allow more time to receive these records. Plaintiff's counsel refused to consent to an adjournment of the depositions insofar as it is office policy not to grant any adjournments. Defendants thereupon requested an immediate

conference with the court which was scheduled for December 4, 2017. Additionally, plaintiff's counsel indicated that he would be ordering a court reporter and appearing with plaintiff regardless of whether defendants would be appearing at the November 30, 2017, deposition. Finally, defendants aver that the Preliminary Conference Order does not include a prohibition regarding adjournments without permission of the court for the completion of examinations before trial.

Plaintiff asserts that she provided defendants with authorizations to obtain all of the necessary medical records on August 15, 2017, which left defendants over three months to secure those records. Moreover, by letter of September 26, 2017, plaintiff's counsel advised defendants' attorney that he would not consent to an adjournment of the depositions for any reason. Further, plaintiff's counsel states that it was not until November 29, 2017, the day before the depositions, that he learned, upon inquiry from his office, that defendants were not ready to proceed with the depositions because they did not have plaintiff's medical records. Plaintiff's counsel avers that he offered to send the records via facsimile which offer defendants purportedly declined. Plaintiff's counsel also advised defense counsel that he would be producing plaintiff for the deposition and "[i]f they chose not to appear, that was their prerogative (sic)," Affirmation in Opposition, p. 3. Plaintiff, who had taken the day off from work, and her attorney then appeared for the deposition as scheduled on November 30, 2017. When defendants did not appear after 30 minutes, plaintiff's counsel placed a statement on the record wherein he asserted that he considered plaintiff's deposition waived. *See* plaintiff's Exhibit E, p.4. Lastly, plaintiff counters that "[t]he Preliminary Conference Order states that no adjournments of any time directive above shall be permitted without the permission of the court," *see* Affirmation in Opposition, p. 2, and that depositions are included within the ambit of this language.

At the compliance conference on December 4, 2017, plaintiff's counsel refused to accept a new court order directing the plaintiff to appear for a deposition, indicating that he would not produce his client for an examination before trial.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, among other things, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious

(*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). “Willful and contumacious conduct can be inferred from repeated noncompliance with court orders . . . coupled with no excuses or inadequate excuses” (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

It is, of course, beyond cavil that plaintiff would have material and necessary information pertaining to this case. The court does not condone defendants’ failure to obtain timely plaintiff’s medical records, or timely realize that they were not in possession of those records necessary to conduct plaintiff’s deposition. Plaintiff’s conduct has, however, only exacerbated this situation. There is no history here of defendants repeated failure to comply with court directives. While it is perhaps understandable for plaintiff to have been concerned about missing a court ordered deposition deadline, given that defendants requested, per this court’s rules, an immediate conference with the court to address this issue and the reason underlying their request to delay plaintiff’s deposition, plaintiff’s counsel’s adamant refusal to reschedule his client’s deposition without the need for motion practice is disturbing as is his unilateral assertion on the record that he considered plaintiff’s deposition waived when defendants did not appear for the deposition. There were ample other remedies available to plaintiff to address any prejudice she may have suffered from the postponement of her deposition. Instead, we are faced with an unnecessary drain on judicial resources and delay in the prosecution of this matter.

Accordingly, it is

ORDERED that the defendants’ motion for an order pursuant to CPLR 3124 and 3126 compelling plaintiff to appear for an examination before trial is granted; and it is further

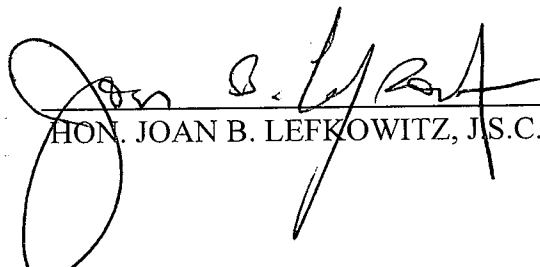
ORDERED that plaintiff shall appear for her deposition on or before February 23, 2018; and it is further

ORDERED that defendants’ motion for an order pursuant to CPLR 8106 directing plaintiff to pay the costs and fees for making this motion is denied; and it is further

ORDERED that counsel for the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on February 26, 2018, at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
February 5, 2018


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

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cc: Compliance Part Clerk