

**Moody v Elliott**

2018 NY Slip Op 34476(U)

July 2, 2018

Supreme Court, Westchester County

Docket Number: Index No. 68637/2015

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  
WILLIAM MOODY,

*Plaintiff,*

*~against~*

VERONICA ELLIOTT,

*Defendant.*  
-----X

LEFKOWITZ, J.

DECISION AND ORDER

Index No. 68637/2015

Motion Seq. No. 4

Motion Return Date: 7/2/2018

The following papers were read on this motion by defendant, Veronica Elliott, (hereinafter “defendant”) for an order pursuant to 22 NYCRR 202.21(e) vacating the note of issue and striking this action from the calendar and pursuant to CPLR 3124, compelling plaintiff to provide a supplemental bill of particulars, appear for a further examination before trial and to appear for a further independent medical examination, or in the alternative, for an order pursuant to CPLR 3162(2) precluding plaintiff from offering any testimony in this matter together with the costs of this motion pursuant to CPLR 8106 and 8202 together with sanctions for failing to provide the requested items and for such other and further relief as to this Court deems just and proper.

Order to Show Cause; Affirmation in Support; Exhibits A-C; Affidavit of Service.  
Affirmation in Opposition; Exhibits 1-8.

This action sounding in personal injury resulting from a motor vehicle accident that occurred on December 18, 2012, was commenced by the filing of a summons and complaint on October 26, 2015.<sup>1</sup> Defendant served her answer on December 2, 2015 together with discovery demands.<sup>2</sup>

Upon the completion of discovery, the trial readiness order was filed on July 10, 2017<sup>3</sup>, and the

<sup>1</sup> NYSCEF Doc. No. 1, Exhibit A to defendant’s moving papers, NYSCEF Doc. No. 85, Exhibit 1 to plaintiff’s opposition papers, NYSCEF Doc. No. 91.

<sup>2</sup> NYSCEF Doc. No. 3.

<sup>3</sup> NYSCEF Doc. No. 77.

note of issue was filed on July 20, 2017.<sup>4</sup> Thereafter, by decision and order dated September 8, 2017, summary judgment was denied to plaintiff (Giacomo, J).<sup>5</sup>

Subsequently, on February 20, 2018, counsel appeared in the Settlement Conference Part of this Court before the Hon. Joan B. Lefkowitz. Defense counsel asserts that it was during this conference that defendant and the Court were advised by plaintiff that he would require surgery on his right shoulder. At this juncture, the matter was referred to the Compliance Conference Part.

Defendant contends that a compliance conference was held on March 21, 2018 during which plaintiff was instructed to provide a copy of his operative report and authorizations regarding the alleged surgery which he underwent on March 15, 2018. Counsel was directed to return to court on April 18, 2018 to confirm that plaintiff had provided the documents to substantiate that plaintiff had further surgery. The parties appeared on April 18, 2018; however, plaintiff had not provided to defendant the information demanded. The conference was adjourned to May 8, 2018, and plaintiff's counsel was again instructed to provide requested documents. On May 8, 2018, counsel appeared. Plaintiff's counsel claimed a copy of the operative report (together with authorizations) had been mailed to defense counsel. Defendant's attorney advised the Court that they had not received any documents from plaintiff, and consequently, a briefing schedule was issued. Defense counsel states that although plaintiff's counsel emailed a copy of the authorizations and operative report to defendant's office on May 8, 2018, the original authorizations were never received by their office or service of the supplemental bill of particulars.

Plaintiff's counsel responds that she, did in fact, provide a copy of an operative summary from St. Joseph's Medical Center and original authorizations for Dr. Louis C. Rose and Saint Joseph's Medical Center to defendant by correspondence dated April 27, 2018. She claims when she learned for the first time at the May 8, 2018 court conference that defendant had not received a copy of the operative report and the authorizations she previously sent, she emailed copies of such documents to counsel and subsequently provided a supplemental bill of particulars on June 1, 2018. Moreover, plaintiff's attorney insists that defendant's application is moot as she believes she is in compliance with the court directives and consents to a further deposition limited to plaintiff's post-note of issue surgery to his right shoulder and an independent medical examination of such shoulder following the deposition.

Once a note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)-(e). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings." Here, plaintiff's additional surgery, which occurred after the filing of the note of issue and certificate of readiness, constitutes unusual or unanticipated circumstances

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<sup>4</sup>NYSCEF Doc. No. 78.

<sup>5</sup>NYSCEF Doc. NO. 80.

requiring additional discovery.

Accordingly, in order to prevent substantial prejudice, the note of issue and certificate of readiness are vacated in order that additional discovery may be conducted limited to plaintiff's May 15, 2018 surgery. Moreover, contrary to plaintiff's posture, she has not provided defendant with original, duly executed HIPPA-compliant authorizations for Saint Joseph's Hospital and Dr. Louis C. Rose despite being duly demanded by defendant.

In reviewing that branch of defendant's motion which seeks an order for sanctions for failing to provide the requested items and pursuant to CPLR 8106 and 8202 awarding the costs of this motion, such application is denied at this juncture.

On a CPLR 3126 motion to strike papers as a consequence of a party's failure to proceed with discovery, "the nature and degree of the penalty ... is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal*, 38 AD3d at 820; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

"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, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

In this instance, plaintiff attempted to comply with defendant's request by mailing the requested authorizations together with a copy of the operative report to defendant on April 27, 2018 as indicated by counsel's correspondence and attachments. It is unclear why the correspondence and attachments were not delivered to defense counsel's office. Upon learning that such documents were not received by defendant's attorney, she immediately emailed a courtesy copy of such documents to her. She has also served defendant with her supplemental verified bill of particulars. The only items which defendant has not received are two, duly executed, original HIPPA-compliant authorizations which must be provided to counsel forthwith. Accordingly, the Court declines to award costs or sanctions at this time.

In view of the foregoing, it is

ORDERED that, defendant's motion is granted to the extent that the note of issue and certificate

of readiness filed via NYSCEF on July 20, 2017 are vacated; and it is further

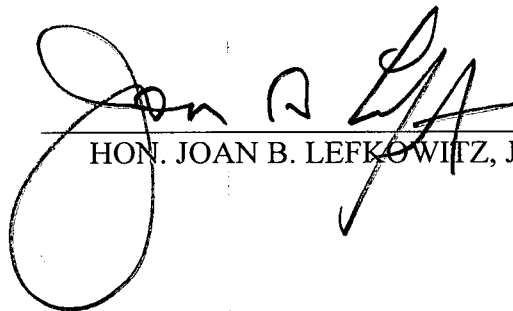
ORDERED that, to the extent not previously provided, plaintiff shall serve upon defendant original, duly executed, HIPPA-compliant authorizations for Dr. Louis C. Rose and Saint Joseph's Medical Center on or before July 9, 2018; and it is further

ORDERED that, the parties shall appear for a conference in the Compliance Part on July 24, 2018, Courtroom 800 at 9:30 a.m.; and it is further

ORDERED that, defendant shall serve a copy of this order with notice of entry on plaintiff within seven days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
July 2, 2018



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

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