

Thomas v Coghill

2019 NY Slip Op 30456(U)

February 14, 2019

Supreme Court, New York County

Docket Number: 162547/2015

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10**

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ANASTASIA THOMAS and KEIFFE CARSON Index No.: 162547/2015

-against-

Hon. GEORGE J. SILVER

ALICE COGHILL, M.D., MIDTOWN PRIMARY CARE, SUCZANNE FRASCA, D.O., BETH ISRAEL AMBULATORY CARE SERVICES CORP., ILONA COHEN, M.D., BETH ISRAEL MEDICAL CENTER, MICHELE BALTUS, M.D., and HUNTINGTON MEDICAL GROUP, P.C.

Justice Supreme Court

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The following papers numbered 1 to 4 were read on this motion to **DISMISS/COMPEL** (Seq. No. 004):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3, 4

HON. GEORGE J. SILVER:

This medical malpractice action arises out of treatment rendered to plaintiff ANASTASIA THOMAS ("plaintiff") in 2013. Plaintiff claims that defendants collectively failed to diagnose her breast cancer.

Plaintiff commenced this action with the filing of a summons and complaint on December 8, 2015. Thereafter, issue was joined. Together with their respective answers, defendants served upon plaintiff demands for numerous discovery items. Included in those demands were requests for a verified bill of particulars, collateral source information, tax returns and employment records, and a demands for authorizations for plaintiff's treating medical providers.

Defendants submitted good faith letters to plaintiff requesting plaintiff's responses to their collective discovery demands after plaintiff's counsel repeatedly failed to provide the requested items. Thereafter, defendants moved to dismiss plaintiff's complaint for failure to provide discovery or alternatively, to compel plaintiff to respond to the outstanding demands. That application was resolved by an order dated February 15, 2017. Thereafter, the parties appeared for a preliminary conference on May 8, 2018, at which time plaintiff was ordered to provide, within 20 days, authorizations for plaintiff's

Motion is Respectfully Referred to Justice:
Dated:

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providers including, but not limited to, radiology, oncology, and ob-gyn providers. Plaintiff was further directed to provide collateral source authorizations and employment authorizations.

At a compliance conference on November 20, 2018, plaintiff was ordered to provide outstanding authorizations, including collateral source authorizations and employment authorizations. At a second compliance conference on December 18, 2018, defendants stated that they still had not received substantive responses from plaintiff. As such, defendant ILONA COHEN, M.D. ("Dr. Cohen") moves, pursuant to CPLR §§3042(c) and 3126, for an order dismissing plaintiff's complaint for plaintiff's failure to timely provide a bill of particulars. Dr. Cohen also seeks dismissal of plaintiff's complaint, pursuant to CPLR §3126, on account of plaintiff's failure to comply with Dr. Cohen's discovery demands. In the alternative, Dr. Cohen asks this court to issue an order, pursuant to CPLR §3124, compelling plaintiff to provide a bill of particulars as well as responses to Dr. Cohen's discovery demands. Defendant MICHELE BALTUS, M.D. ("Dr. Baltus") joins in that application. Plaintiff opposes defendants' respective applications in their entirety, and cross-moves to strike defendants' answers on account of defendants' purported failure to respond to plaintiff's omnibus demands dated March 18, 2018. In clear contravention of the rules delineated in CPLR §2215, which require that a cross-motion be served on all parties at least three days prior to the motion date, here plaintiff served her cross-motion on the even of the motion date, February 4, 2019. At the ensuing conference before the court on February 5, 2019, plaintiff explained that plaintiff's late service was occasioned by an unanticipated injury suffered by plaintiff's assigned counsel. Notwithstanding the procedural deficiencies in plaintiff's submission, plaintiff substantively argues that it has wholly responded to defendants' discovery requests. Defendants ALICE V. COGHILL, M.D. ("Dr. Coghill") and MIDTOWN PRIMARY CARE challenge that position.

DISCUSSION

CPLR §3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must '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' " (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Merry Med. Ctr.*, 83 AD3d 998, 998 [2d Dept. 2011]; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d 750, 750 [2d Dept. 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept. 1989]; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d at 750, *supra*).

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Under CPLR §3042 (c), where a party fails to respond to a demand for a bill of particulars, the party seeking the bill of particulars may move to compel compliance. Further, if the failure to provide particulars is deemed to be willful, “the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in [CPLR §3126]” (CPLR §3042[d]; *see also Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 101 [1st Dept 2001]).

CPLR §3126 permits the court to dismiss an action or to preclude a plaintiff from offering testimony or evidence, which would effectively result in dismissal, where it is determined that the plaintiff's conduct in failing to provide discovery was willful or contumacious (*see Patterson v. New York City Health and Hospitals Corp.*, 284 AD2d 516 [2d Dept. 2001]). It is noted that these extreme sanctions may be warranted even where a noncompliant party has not violated a discovery order of the court (*see Wolfson v. Nassau County Medical Center*, 141 AD2d 815 [2d Dept. 1988]). Notwithstanding, the nature and degree of the penalty imposed under CPLR §3126 is within the discretion of the court (*see Patterson*, 284 AD2d 516, *supra*; *Lowitt v. Korelitz*, 152 AD2d 506 [1st Dept. 1989]).

A party must provide authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting her physical condition in issue (*see CPLR §3121 [a]*; *Dillenbeck v Hess*, 73 NY2d 278 [1989]). Indeed, in order to properly defend against a plaintiff's claims, defendants requires authorizations and records in relation to a plaintiff's injuries as parties are entitled to discovery of information that is material and necessary to defend against claims (*Slabakis v. Drizin*, 107 AD2d 45[1st Dept 1985])

In the instant action, plaintiff's willful and contumacious conduct may be inferred from the extensive nature of her failure to comply with or object to defendants' demands, coupled with her failure to timely respond to the instant motion by offering a reasonable for her noncompliance (*see Birch Hill Farm, Inc. v. Reed*, 272 AD2d 282 [2d Dept. 2000]). While injury to plaintiff's counsel explains plaintiff's inability to timely submit a response to defendants' respective motion papers, that alone does not excuse the over two-year delay that has been occasioned by plaintiff's inadequate responses to defendants' discovery demands. While plaintiff did provide defendants with verified bills of particulars on March 18, 2018, plaintiff's submission contained deficiencies which defendants highlighted for plaintiff, but which plaintiff did not respond to. Indeed, in contravention of established case law, plaintiff has inadequately specified acts of negligence specific to each defendant (*Batson v. La Guardia Hosp.*, 194 AD2d 705, 706 [2d Dept. 1993]). Similarly, although plaintiff served defendants with various authorizations, each of those authorizations did not contain plaintiff's social security number, and therefore could not be processed. Moreover, plaintiff's marriage certificate, which plaintiff was also directed to provide, does not contain a signature of the town clerk who issued the license, and any evidence that plaintiff's marriage was solemnized. As such, plaintiff has willfully failed to provide defendants with discovery that they are entitled to, and which this court has previously ordered. Nevertheless, in the exercise of discretion and pursuant to CPLR §3124, and in view of the policy favoring resolution of disputes on their merits (*see Colucci v. Jennifer Convertibles Inc.*, 283 AD2d 224 [1st

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Dept. 2001)), plaintiff will be provided with a further opportunity to respond to defendants' demands for supplemental bills of particulars, and other discovery demands. However, in the event that plaintiff fails to comply with the directives set forth below, she shall be precluded from offering testimony or evidence upon the trial of this action.

Indeed, it is axiomatic that defendants be provided with supplemental bills of particulars that adequately address the deficiencies highlighted by defendants, not limited to specificity with regards to the malpractice alleged with respect to each defendant. Moreover, defendants are entitled to HIPAA-compliant authorizations containing plaintiff's social security number in order to obtain medical records for plaintiff's various providers. Finally, plaintiff must provide collateral source authorizations, employment authorizations, and a complete marriage certificate in response to defendants' prior discovery demands.

Should plaintiff fail to provide the aforementioned items within 30 days of service of this order with notice of entry, defendants shall be able to renew this motion, and this court may impose sanctions against plaintiff including, but not limited to, preclusion, dismissal, and costs. This court further directs, as previously mentioned, that plaintiff to provide a verified bill of particulars addressing the deficiencies highlighted by defendants, pursuant to CPLR §3042(c), within 30 days of service of this order with notice of entry. Plaintiff's failure to do so will result in defendants' ability to renew the motion seeking the penalties enumerated immediately above. Plaintiff's cross-motion is denied, as this court finds it to be an improvident exercise of its discretion to entertain an application by plaintiff to strike defendants' respective answers where plaintiff has so blatantly failed to fully comply with its own previously served and ordered discovery obligations.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion is denied insofar as it seeks to dismiss the complaint, to preclude plaintiff from introducing evidence at trial, to enter judgment in favor of defendants, and to recover the costs of this motion; and it is further

ORDERED that the motion is granted to the extent that plaintiff is directed to respond to defendants' demands for a supplemental verified bill of particulars and to provide HIPAA-compliant authorizations for plaintiff's medical providers with a social security number, within 30 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff is directed to provide collateral source authorizations and employment authorizations to defendants, to the extent not previously provided, within 30 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff is directed to provide defendants with an updated marriage certificate, containing a signature of the town clerk who issued the license, and any other evidence that plaintiff's marriage was solemnized, within 30 days of service of this order with notice of entry; and it is further

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ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that defendants shall have leave to renew the instant motion if plaintiff fail to comply with this order within 30 days of service of this order with notice of entry and, upon such renewed motion, defendants may seek sanctions against plaintiff including, but not limited to, preclusion, dismissal, and costs; and it is further,

ORDERED that this case is scheduled for a conference before the court on March 19, 2019 at 9:30 AM in Room 1227 at 111 Centre Street, as previously provided.

This constitutes the decision and order of the court.

Dated: February 14, 2019

Hon. George J. Silver

GEORGE J. SILVER, J.S.C.

GEORGE J. SILVER

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT