

Taylor v Hamburger
2019 NY Slip Op 31063(U)
April 9, 2019
Supreme Court, New York County
Docket Number: 805016/17
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

TANZEA TAYLOR,

Plaintiff,

MOTION INDEX 805016/17

- v -

MOTION DATE
MOTION SEQ. NO. 003

JOSHUA HAMBURGER, M.D., GEORGE N. ARIDA,
M.D., and THE MOUNT SINAI HOSPITAL,

Defendants.

Cross-Motion: Yes No

Defendants JOSHUA HAMBURGER, M.D. and THE MOUNT SINAI HOSPITAL (“defendants”) move for an order, pursuant to CPLR §§ 3101 and 3126, dismissing the complaint with prejudice due to plaintiff’s failure to comply with court orders, and failure to respond to defendants’ discovery demands. In the alternative, defendants move for an order, pursuant to CPLR §§ 3101(a), 3126, and 3124, compelling plaintiff to provide outstanding discovery by a date certain, and automatically dismissing the complaint if plaintiff fails to do so, and/or precluding plaintiff from offering evidence in support of the claimed injuries at trial. Plaintiff TANZEA TAYLOR (“plaintiff”) opposes the application. For the reasons discussed below, the motion is granted in part.

BACKGROUND AND ARGUMENTS

This medical malpractice action was commenced with the filing of the summons and complaint on or about January 26, 2017. On March 3, 2017, defendants filed answers. Along with

their answers, defendants served combined discovery demands, a demand for authorizations, a demand for a bill of particulars, and a demand for experts. Plaintiff failed to respond to the demands.

On August 29, 2017, defendants sent a follow-up letter to plaintiff seeking a response to their March 3, 2017 demands. Plaintiff failed to respond to this letter. On October 25, 2017, defendants moved to dismiss the complaint, or in the alternative, to compel plaintiff to provide outstanding discovery. During the pendency of defendants' motion, plaintiff served defendants with bills of particulars, and some discovery responses. However, based on the deficient responses, defendants sent plaintiff a letter on December 12, 2017 outlining the same. Subsequently, on January 31, 2018, defendants' motion was withdrawn pursuant to a preliminary conference order. On March 3, 2018, defendants sent a third letter to plaintiff addressing the outstanding discovery, including HIPAA authorizations.

At a compliance conference on May 2, 2018, the parties entered into an order directing plaintiff to provide outstanding discovery. That same day, defendants sent another letter to plaintiff addressing such discovery. On August 1, 2018, defendants served plaintiff a follow-up demand for discovery, and noted that Section 9(a) of the authorizations that plaintiff provided were incomplete. On August 31, 2018, having not received the demanded authorizations nor corrected versions of the defective authorizations, defendants sent plaintiff another follow-up letter.

In their motion, defendants incorporate and adopt by reference co-defendant, Dr. George Arida's arguments as set forth in his motion dated September 7, 2018, seeking dismissal pursuant to CPLR § 3126 based on plaintiff's failure to comply with discovery demands. Defendants similarly argue that plaintiff advances no excuse for her failure to provide outstanding discovery, including properly executed HIPAA authorizations with necessary portions such as Alcohol/Drug,

Mental Health, and HIV signature lines completed. Defendants contend that plaintiff's counsel was notified of the error via email on August 1, 2018, but failed to correct the deficiencies. Defendants also highlight that while plaintiff initially objected to certain demands, plaintiff has disregarded two subsequent court orders directing plaintiff to provide the demanded discovery. Defendants further argue that plaintiff's failure to provide discovery has resulted in an unreasonable delay of this case, which prejudices defendants.

In opposition, plaintiff asserts that the motion is moot since plaintiff has provided the outstanding discovery.

In reply, defendants assert that plaintiff has had ample time to cure the defects in discovery, but has failed to do so. Defendants also maintain that on January 18, 2019 and February 8, 2019, defendants sent plaintiff's counsel good faith letters addressing such deficiencies. Defendants further argue that contrary to plaintiff's assertion, the motion is not moot since plaintiff continues to provide defective authorizations, and throughout the course of litigation, has willfully, contumaciously, and deliberately failed to comply with court orders.

DISCUSSION

CPLR § 3101 mandates "full disclosure of all matters that are material and necessary." Parties to an action are entitled to reasonable discovery "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Med. Ctr.*, 98 A.D.2d 624, 625 [1st Dept. 1983]). CPLR § 3124 allows a party to compel disclosure when a person has failed to comply with a request, notice, interrogatory, demand, question or order. CPLR § 3126 gives courts the discretion to impose penalties including dismissal, upon parties who willfully fail

to disclose information which the court orders to be disclosed. “A court may, *inter alia*, issue an order ‘striking out pleadings or ... rendering a judgment by default’ as a sanction against a party who ‘refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed’” (*Argo v. Queens Surface Corp.*, 58 A.D.3d 656, 656 [2d Dept. 2009]; *see also, Schwartz v. Suebsanguan*, 15 A.D.3d 565, 566 [2d Dept. 2005] [“[W]illful and contumacious conduct can be inferred from [plaintiff’s] repeated failure to adequately respond to discovery demands and court directives to comply with the demands, and his inadequate explanations for his failures to comply”]; *Rowell v. Joyce*, 10 A.D.3d 601 [2d Dept. 2004] [“[T]he willful and contumacious character of the plaintiffs’ failure to respond to discovery can be inferred from their repeated refusals to comply with the respondents’ discovery requests, even after being directed to do so by court order, as well as the absence of any explanation offered to excuse their failures to comply.”]).

Here, plaintiff has failed to provide discovery despite multiple court orders and correspondence from defendants. Although plaintiff claims that she has provided the discovery requested, thereby rendering defendants’ motion moot, defendants asserts that there still remains outstanding discovery, including a supplemental bill of particulars and authorizations. Defendants also note that some of the discovery provided by plaintiff is deficient despite defendants’ attempts to notify plaintiff of her errors. For example, defendants highlight that some of plaintiff’s HIPAA authorizations lack necessary portions such as Alcohol/Drug, Mental Health, and HIV signatures.

Accordingly, based on the insufficiencies of the discovery provided by plaintiff, plaintiff is directed to respond and/or provide the discovery demanded within 30 days of this decision. In light of the multiple court orders, defendants’ requests, and prior motion practice with respect to

this issue, plaintiff's failure to comply with the above-mentioned discovery demands may result in the dismissal of the complaint.

As such, it is hereby

ORDERED that defendants' application to dismiss the complaint with prejudice is denied; and it is further

ORDERED that defendants' application to preclude plaintiff from offering evidence in support of the claimed injuries at trial is denied; and it is further

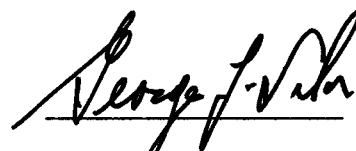
ORDERED that plaintiff shall provide a supplemental bill of particulars within 30 days of this decision; and it is further

ORDERED that plaintiff shall provide all outstanding HIPAA-compliant authorizations within 30 days of this decision; and it is further

ORDERED that the parties are directed to appear for a compliance conference on 7/16/19 at 2:30 P.M. at 111 Centre Street (Part 10 Room 1227) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: 4/9/19


GEORGE J. SILVER
J.S.C.

Check one: Case Disposed Non-Final Disposition