

Taylor v Hamburger
2019 NY Slip Op 31064(U)
April 12, 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. 002

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

Defendants.

Cross-Motion: Yes No

Defendant GEORGE N. ARIDA (“defendant”) moves for an order, pursuant to CPLR §§ 3216(a) and 3126(3), dismissing the complaint with prejudice due to plaintiff’s willful pattern of noncompliance with discovery and willful neglect of this matter by disregarding multiple court orders. Defendant alternatively requests that the court order plaintiff to provide any outstanding discovery within 15 days and prior to the filing of a note of issue.¹ 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 16, 2017. Defendant served an answer on March 30, 2017. Defendant also served initial combined demands and a demand for a verified bill of particulars.

¹ Pursuant to the rules of my part, the note of issue shall not be filed until the parties stipulate that all discovery is complete.

On April 7, 2017, defendant sent a letter to plaintiff demanding medical and collateral source authorizations. Plaintiff failed to respond to the demand. Defendant thereafter sent a good faith letter to plaintiff's counsel on or about September 29, 2017, requesting that plaintiff respond to defendant's initial discovery demands, including demands for authorizations.

On November 6, 2017, defendant cross-moved to dismiss plaintiff's complaint for willful failure to furnish a bill of particulars or any previously demanded discovery, or in the alternative, to compel plaintiff to provide outstanding discovery by a date certain, and/or to preclude plaintiff from offering evidence at trial if plaintiff fails to do so. On November 28, 2017 and January 16, 2018, plaintiff provided a bill of particulars and a supplemental bill of particulars, respectively.

On January 22, 2018, defendant served plaintiff with a demand for authorizations. On January 31, 2018, the parties appeared for a preliminary and motion conference. Defendant withdrew his motion pursuant to the preliminary conference order, which directed plaintiff to provide a further response to the bill of particulars as to defendant and all outstanding discovery, including both HIPAA and Arons authorizations within 30 days. Plaintiff was also directed to check off Section 9(a) on all authorizations.

On April 30, 2018, plaintiff provided a response to defendant's demands for authorizations. However, the authorizations were insufficient as plaintiff did not initial Section 9(a). During a compliance conference on May 2, 2018, the parties stipulated that plaintiff was to provide further responses to the bill of particulars as outlined in the preliminary conference order, as well as collateral source authorizations, and other outstanding discovery within 30 days.

On July 13, 2018, defendant sent a correspondence to plaintiff's counsel advising that the HIPAA authorization for CVS Pharmacy was denied because section 9(a) was incomplete. On July 26, 2018, defendant sent plaintiff a good faith letter advising of the outstanding discovery, and

requested that the discovery be provided within 15 days. Plaintiff failed to provide the discovery in the time allotted.

Defendant argues that plaintiff's failure to provide discovery despite multiple court orders and good faith correspondences is willful and contumacious, and therefore, the court should dismiss the complaint or direct plaintiff to provide responses to all outstanding demands within 15 days.

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

In reply, defendant asserts that plaintiff's opposition papers were served late, and should not be considered by the court. Additionally, defendant argues that the motion is not moot since plaintiff has still not complied with subsequent court orders or defendant's follow-up requests to provide the discovery demanded. However, defendant notes that on February 6, 2019, plaintiff responded via email that he had "responded to all of (our) demands" and that defendant would receive "PDF copies" of responses the following morning. On February 7, 2019, defendant received bills of particulars, supplemental bills of particulars, and responses to his discovery demands, both new and old. In response to plaintiff's emails, defendant sent a letter to plaintiff indicating that there was still discovery outstanding.

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 defendant. Although plaintiff claims that she has provided the discovery requested, thereby rendering defendant’s motion moot, defendant outlines further deficiencies with the discovery provided by plaintiff. For example, defendant highlights that plaintiff’s supplemental bill of particulars failed to address, *inter alia*, the specific allegations of negligence as to Dr. Arida, the length of time plaintiff was confined to bed, home, hospital, and rehabilitative facility, and the claimed special damages. Defendant also notes that while plaintiff included authorizations and a medical chart, the authorizations do not include plaintiff’s date of birth or social security number,

and the Arons authorizations do not list the specific names of the attorneys authorized to discuss plaintiff's medical condition.

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, defendant's 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 defendant's application to dismiss the complaint with prejudice is denied; and it is further

ORDERED that plaintiff shall provide a further supplemental bill of particulars addressing defendant's specific demands as outlined in defendant's reply brief within 30 days; and it is further

ORDERED that plaintiff shall provide HIPAA-compliant authorizations within 30 days; and it is further

ORDERED that plaintiff shall provide properly executed Arons authorizations within 30 days; and it is further

ORDERED that the parties are directed to appear for a compliance conference on May 20, 2019 at 9:30 A.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: 4/12/19

Check one: Case Disposed Non-Final Disposition

George J. Silver

GEORGE J. SILVER