

Wright v Kok-Min Kyan
2019 NY Slip Op 31331(U)
April 12, 2019
Supreme Court, New York County
Docket Number: 805475/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Christine J. Wright and Burt L. Wright,

Plaintiffs,

Index No.
805475/2016

**DECISION and
ORDER**

- against -

Mot. Seq. #002

Kok-Min Kyan, MD, Rene Marcias- Rodriguez, MD,
Lenox Hill Hospital, and Northwell Health, Inc.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced by the filing of a Summons with Notice on December 14, 2016. This is an action alleging medical malpractice and lack of informed consent arising from medical treatment Christine J. Wright received from defendants from June 23, 2014 through July 3, 2014. Her spouse Burt L. Wright brings a derivative claim for loss of services.

Defendant Rene Macias-Rodriguez, M.D. i/s/h/a Rene Marcias-Rodriguez M.D.'s ("Dr. Macias-Rodriguez") moves for an Order pursuant to CPLR 3126 dismissing Plaintiffs Christine J. Wright and Burt L. Wright's (collectively, "Plaintiffs") Complaint because Plaintiffs have failed to provide Dr. Macias-Rodriguez with a bill of particulars, failed to provide any responses to discovery requests, failed to appear for depositions, failed to appear for multiple Court conferences, and failed to retain new counsel after being personally served with a demand pursuant to CPLR §321(2)(c), or, in the alternative, for an Order precluding Plaintiffs from offering any evidence regarding injuries, medical malpractice, lack of informed consent, loss of consortium, as to Dr. Macias-Rodriguez.

Defendant Kok-Min Kyan, M.D. ("Dr. Kyan"), cross moves to dismiss the Complaint pursuant to CPLR 3126 based upon Plaintiffs' failure to comply with Court Orders and failure to retain new counsel pursuant to CPLR 321.

Plaintiffs do not oppose Dr. Macias-Rodriguez and Dr. Kyan's respective motion and cross motion to dismiss. Defendants Lenox Hill Hospital and Northwell Health Inc. also do not oppose the motions.

Relevant Background

On January 16, 2018, a Preliminary Conference was held in this matter. The Preliminary Conference Order directed Plaintiffs to provide Defendants with the following discovery: (1) a bill of particulars within 20 days; (2) authorizations for all medical providers, pharmacies, hospitals and health care facilities within 30 days; (c) employment records of Christine J. Wright for five years prior to alleged malpractice within 30 days; and (d) responses to all other discovery demands within 30 days. The Preliminary Conference Order also directed Plaintiffs to file a Note of Issue and Certificate of Readiness by January 16, 2019. Plaintiffs' counsel Kaye & Lenchner appeared at the Preliminary Conference on their behalf.

Neither Plaintiffs nor any attorney for them appeared at subsequent conferences scheduled before the Court on March 6, 2018, March 27, 2018, and October 23, 2018.

To date, according to Dr. Macias-Rodriguez and Dr. Kyan's respective motions, Plaintiffs have failed to provide Defendants with any discovery, including but not limited to, a bill of particulars, any authorizations, or any employment records.

Counsel for Dr. Macias-Rodriguez thereafter served Plaintiffs with a Notice to Appoint Another Attorney Within 30 Days. Plaintiffs were personally served with the Notice on November 2, 2018 at their Pennsylvania residence. To date, Plaintiffs have not responded to the Notice.

Legal Standard

CPLR 3126

"CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party's pleadings or outright dismissal of the action." (*Corner Realty 30/7, Inc. v. Bernstein Management Corp.*, 249 A.D.2d 191, 193 [1st Dept 1998]). "However . . . the extreme sanction of dismissal is warranted

only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith.” (*id.*) A “plaintiff’s pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct” (*Jackson v. OpenCommunications Omnimedia, LLC*, 147 A.D.3d 709, 709 [1st Dept 2017]). Although Plaintiff may “tender a reasonable excuse to overcome defendants’ showing of willfulness” (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the [pleading].” (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011].)

22 NYCRR 202.27(b)

22 NYCRR 202.27 (b) provides in relevant part that,

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: . . .

if the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.”

With respect to this provision, the First Department of the Appellate Division stated that the “Supreme Court has the authority to dismiss an action based on a plaintiff’s failure to attend a scheduled court appearance . . . and may do so without providing notice to the parties of its intention in that respect.” (*Grant v. Rattoballi*, 57 A.D.3d 272, 273 [1st Dept 2008]).

Discussion

Plaintiffs have failed to comply with the Preliminary Conference Order which directed them to provide discovery to Dr. Macias-Rodriguez and Dr. Kyan, failed to appear at court scheduled conferences, and have failed to provide any excuse for

their conduct. Plaintiffs' pattern of noncompliance with the Preliminary Conference Order and failure to appear at any Court conferences warrants the sanction of dismissal of the Complaint with respect to the moving Defendants.

Wherefore, it is hereby,

ORDERED that Defendant Rene Macias-Rodriguez, M.D. i/s/h/a Rene Marcias-Rodriguez M.D.'s motion to dismiss the Complaint is granted without opposition and the Complaint is dismissed as against Defendant Rene Macias-Rodriguez, M.D. i/s/h/a Rene Marcias-Rodriguez M.D., and the Clerk is directed to enter judgment accordingly; and it is further

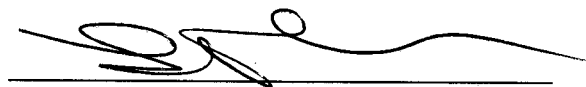
ORDERED that Defendant Kok-Min Kyan, M.D.'s cross motion to dismiss the Complaint is granted without opposition and the Complaint is dismissed as against Defendant Kok-Min Kyan, M.D., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and shall proceed as against remaining Defendants Lenox Hill Hospital, and Northwell Health, Inc.; and it is further

ORDERED that Plaintiffs and the remaining Defendants Lenox Hill Hospital, and Northwell Health, Inc., shall appear for a compliance conference on May 28, 2019 at 9:30 AM in Part 6, 71 Thomas Street, Courtroom 205-D.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 12, 2019



Eileen A. Rakower, J.S.C.