

Johnson v Mount Sinai Hosp.
2019 NY Slip Op 31676(U)
June 11, 2019
Supreme Court, New York County
Docket Number: 805269/2017
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK —NEW YORK COUNTY**PRESENT: GEORGE J. SILVER***Justice*

**AISCHA JOHNSON, Individually as Mother and as
Administrator of the Estate of the Decedent, ARIEL B.
GIBBS, and as Legal Guardian of MYIAN CAMERON
and IAN CAMERON, infants of their parent and
natural guardian, ARIEL B. GIBBS,**

Index No. 805269/2017Motion Seq. No. 002**Plaintiffs,****DECISION & ORDER****- v -**

**MOUNT SINAI HOSPITAL, PAUL E. STELZER, M.D.,
ERIC H. STERN, M.D., USMAN BABER, M.D.,
PRASHANT VAISHNAVA, M.D., and JOHN DOES,
1-10, BEING FICTITIOUS NAMES OF DOCTORS,
NURSES OR OTHER PERSONNEL WHO TREATED
DECEDENT AT MOUNT SINAI HOSPITAL, THE REAL
IDENTITIES OF SAID DEFENDANTS BEING
UNKNOWN TO PLAINTIFF,**

Defendants.

Cross-Motion: ☒ **Yes** ☐ **No**

Plaintiff AISCHA JOHNSON (“plaintiff”), individually as mother, and as administrator of the estate of the decedent, ARIEL B. GIBBS (“decedent”), and as Legal Guardian of MYIAN CAMERON and IAN CAMERON, infants of their parent and natural guardian, decedent moves for an order, pursuant to CPLR § 3124, compelling defendants to comply with court orders dated October 3, 2018 and December 5, 2018 within 20 days, and to respond to plaintiff’s demand letters dated September 13, 2018 and September 18, 2018 with respect to hospital protocols, rules, and regulations within 20 days. In the alternative, plaintiffs move for an order, pursuant to CPLR § 3126, striking defendants’ answers, and granting judgment to plaintiff for defendants’ repeated refusal to comply with court-ordered discovery.

Defendants MOUNT SINAI HOSPITAL, PAUL E. STELZER M.D., ERIC H. STERN M.D. USMAN BABER, M.D., and PRASHANT VAISHNAVA, M.D. (“defendants”) oppose plaintiff’s motion, and cross-move for an order, pursuant to CPLR §§ 3124 and/or 3126, striking plaintiff’s complaint, and dismissing the action for plaintiff’s failure to comply with court orders,

and failure to provide discovery, including authorizations, medical records, and/or non-party depositions of decedent's family. In the alternative, defendants seek an order directing plaintiff to provide such discovery within 30 days, and staying defendants' depositions until plaintiff provides the same.

For the reasons discussed below, the court grants each motion in part.

BACKGROUND

Plaintiff commenced this medical malpractice and wrongful death action with the filing of the summons and complaint on July 14, 2017. Thereafter, the various defendants filed answers on August 14, 2017 and June 22, 2018. Plaintiff alleges that defendants failed to treat and monitor decedent's signs and symptoms of a stenotic aortic valve and severe congenital valvular aortic stenosis, resulting in decedent's death.

On October 27, 2017, plaintiff served defendants with a verified bill of particulars, responses to defendants' various demands, and plaintiffs' initial discovery demands, including a notice for discovery and inspection of the hospital's protocols, rules, and regulations.

On January 10, 2018, a preliminary conference was held. Per the preliminary conference order that followed, defendants were directed to respond to plaintiff's discovery demands, including plaintiff's October 27, 2017 notice for discovery and inspection. On April 4, 2018, a compliance conference was held. Per the compliance conference order that followed, defendants were directed to respond to plaintiff's notice for discovery and inspection. Pursuant to a so-ordered stipulation dated April 18, 2018, and a court order dated July 11, 2018, defendants were to respond to the aforementioned notice for discovery and inspection.

On July 16, 2018, defendants provided a response to plaintiffs' October 27, 2017 notice for discovery and inspection. However, plaintiff alleges that the response was insufficient as defendants failed to properly respond to demands numbered one through five regarding hospital protocols, and demand numbered six regarding the table of contents for hospital policies and protocols. Plaintiff thereafter followed-up with good faith letters on December 13, 2017, March 23, 2018, June 19, 2018, and August 1, 2018.

On August 28, 2018, defendants provided a supplemental response to plaintiff's notice for discovery and inspection. In response, on September 13, 2018, plaintiff served defendants with a

letter requesting specific policies from the OB/GYN policy manual. On September 11, 2018, defendants served a second supplemental response to plaintiff's notice for discovery and inspection. In response, plaintiff served another letter on September 18, 2018 requesting additional policies from the OB/GYN manual based on defendants' supplemental response.

On October 3, 2018, the court directed defendants to provide the policies that were requested in plaintiff's September 13, 2018 and September 18, 2018 letters. On December 5, 2018, the court directed defendants to respond to the October 3, 2018 order. Plaintiff alleges that defendants failed to comply.

Plaintiff argues that despite their attempts to obtain necessary discovery documents, defendants have not provided any of the requested policies and protocols. Plaintiff contends that as a result, this case has been stalled since defendants' depositions cannot proceed in the absence of the policies and procedures. Plaintiff also avers that defendants' blatant disregard for the court's orders demonstrates their willful and contumacious failure to participate in discovery. As such, plaintiff argues that defendants' conduct is frivolous, unjustifiable, and warrants sanctions.

In opposition, defendants argue that they have provided all discovery that plaintiff's motion seeks to compel, and that they do not owe further discovery at this time. Defendants also contend that defendants' depositions have not been held due to plaintiff's refusal to proceed with the depositions without the hospital's policies. Notwithstanding the same, defendants posit that they have responded to plaintiff's demand by offering to search for a listing of the available written policies for the departments which could have been involved in decedent's Mount Sinai admission in February of 2015, including policies for the OB/GYN and cardiology departments. However, defendants aver that they have repeatedly informed plaintiff that there are no written policies responsive to plaintiff's discovery and inspection demands at issue. Defendants also assert that they have provided a table of contents listing the OB/GYN policies which would have been effective during the relevant time period, and have advised plaintiff that once plaintiff selects particular policies from the table of contents, a search would be conducted for those policies that were effective in February of 2015 and February of 2016 if they were still available.

Moreover, defendants maintain that on March 18, 2019, they provided plaintiff with the available written policies for the OB/GYN department, as well as an affirmation by defense counsel stating that there is no table of contents listing the policies applicable to the cardiology

department since such policies were not maintained by the hospital during the pertinent time period.

Defendants also cross-move to compel plaintiff to provide outstanding discovery. Specifically, defendants contend that plaintiff has failed to provide an authorization for the medical examiner's entire file and an Arons authorization for the medical examiner, a properly executed authorization for Medicaid records, an authorization for decedent's tax return records, an authorization for P.S. 101 and P.S. 106 school records, an authorization for ACS and CPS records, an authorization for decedent's Facebook, Instragram, and social media accounts, and a written response to defendants' demand for the non-party depositions of decedent's father and aunt.

In reply, plaintiff asserts that she has provided all outstanding discovery, except for an IRS authorization and a copy of decedent's final death certificate, which she will provide under a separate cover. Plaintiff contends that she has repeatedly objected to defendants' demand for decedent's Facebook and school records, and that defendants should move to compel these items if they believe that plaintiff's objections are inappropriate. Plaintiff also advises that she has provided the last known addresses of decedent's father and aunt in her November 15, 2018 discovery response, and will advise under a separate cover whether she will produce these individuals voluntarily. Plaintiff also states that she does not consent to proceeding with the non-party depositions before the completion of defendants' depositions.

In addition, plaintiff argues that contrary to defendants' assertion, plaintiff's motion is not moot. Plaintiff avers that defendants' discovery response is insufficient in light of plaintiff's letter demands dated September 13, 2018 and September 18, 2018. Specifically, plaintiff highlights that of the 15 policies that she demanded, defendants only provided five. Plaintiff also submits that because defendants claim that the cardiology policies and tables of contents do not exist, she is entitled to an affidavit attesting to the same. Plaintiff further maintains that she is entitled to depose the Director/Chair of the Department of Cardiology as well as the Director/Chair of the Risk Management Department.

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.”])).

I. Plaintiff’s Motion

Here, in light of defendants’ deficient response to plaintiff’s demand for OB/GYN policies, defendants are directed to supplement their response to respond to and/or provide the following OB/GYN policies within 30 days:

- OBN-5 - Timing of Medically Indicated Deliveries.
- OBN-10 - Management of Pregnancy - Associated Acute Onset Severe Hypertension.
- OBN-12 - Guidelines for Peripartum Care by Maternal Fetal Medicine.
- OBN-17 - Triage of Patients in the Emergency Department and Labor & Delivery.
- OBN-19 - Consensus Best Practices for Obstetrics.
- OBN-23 - Serious Events in Labor and Delivery.
- ON-7 - Attending Roles and Responsibilities for OB and GYN.
- OB-002-13 - Communication Escalation Protocol - Chain of Command
- OB-011-11 - Multidisciplinary Plan for High-Risk Pregnant Patients with Cardiac Disease.
- OB-2.27 - Post-Partum Appointments.

However, to the extent that above-listed OB/GYN policies do not exist, defendants are directed to provide an affidavit to that effect, including their efforts to obtain such policies, within 30 days of this order. Similarly, as defendants have claimed that no cardiology policies or tables

of contents exist, defendants shall provide an affidavit to that effect, including their efforts to obtain such policies, within 30 days of this order.

However, plaintiff's request to depose the Director/Chair of the Department of Cardiology as well as the Director/Chair of the Risk Management Department is denied. Plaintiff's reply conclusively states that plaintiff is entitled to depose the above-listed individuals without demonstrating a sufficient basis for her request, or showing that the testimony of the Director/Chair of the Department of Cardiology and the Director/Chair of the Risk Management Department is relevant and material to the case at bar (*see, Colicchio v. City of New York*, 181 A.D.2d 528, 529 [1st Dept. 1992] ["A] party seeking to depose additional witnesses must make a detailed showing of the necessity for taking such depositions"]; *see also, Spohn-Konen v. Town of Brookhaven*, 74 A.D.3d 1049 [2d Dept. 2010]; *Wilkie & Denton v. Moore*, 1858 WL 6869 [N.Y. Sup. Ct. New York County 1858] ["It is not sufficient for a party to say that he thinks a discovery is necessary. He must show how and why it is necessary, or he is not entitled to have his motion granted."])).

Moreover, the court declines to sanction defendants for their failure to provide discovery as there has been no evidence that their conduct was willful, contumacious, or discharged in bad faith (*Casanas v. Carlei Grp., LLC*, 149 A.D.3d 515, 515 [1st Dept. 2017] ["[A] drastic sanction is generally warranted 'only upon a clear showing that the party's conduct was willful and contumacious.'"])).

II. Defendants' Cross-Motion

Plaintiff is directed to provide a properly executed and updated authorization for decedent's Medicaid records, a properly executed and updated authorization for the medical examiner's entire file, and an Arons authorization for the medical examiner. Per the compliance conference order dated October 3, 2018, plaintiff is directed to *provide* a copy of decedent's final death certificate, a properly executed authorization for ACS and CPS records, a properly executed authorization for P.S. 101 and P.S. 96 school records, and an authorization for Facebook, Instagram, and other social media records within 30 days of this order. Plaintiff is also directed to provide an authorization for decedent's IRS tax return records within 30 days, as well as obtain a copy of decedent's tax return records, and provide the same to defendants within 45 days.

Furthermore, defendants' depositions and the non-party depositions of decedent's father and aunt will be scheduled at the next compliance conference, with party depositions to precede the non-party depositions. However, plaintiff is directed to advise defendants whether she will produce decedent's father and aunt voluntarily for depositions within 30 days of this order.

Consequently, it is hereby

ORDERED that plaintiff's application to strike defendants' answer and grant judgment to plaintiff is DENIED; and it is further

ORDERED that plaintiff's application to compel defendants to produce outstanding discovery is GRANTED to the extent previously indicated; and it is further

ORDERED that defendants' cross-motion to strike plaintiffs' complaint and dismissing the action is DENIED; and it is further

ORDERED that defendants' application to compel plaintiff to provide outstanding discovery is GRANTED to the extent previously indicated; and it is further

ORDERED that the parties are directed to appear for a compliance conference on August 13, 2019 at 111 Centre Street, Room 1227 (Part 10) 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: June 11, 2019


HON. GEORGE J. SILVER
GEORGE J. SILVER
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION