

Elias v Tolbert

2019 NY Slip Op 31779(U)

June 13, 2019

Supreme Court, New York County

Docket Number: 805082/2013

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

MURRAY ELIAS, as Executor of Last Will and Testament of ANNE ELIAS, deceased, and MURRAY ELIAS, Individually,

Index No. 805082/13
Motion Seq. No. 003

Plaintiff,

- v -

DECISION AND ORDER

DR. JEROME TOLBERT, DR. LAWRENCE G. HERBERT, DR. IRA S. BLAUFARB, BETH ISRAEL HOSPITAL, LENOX HILL HOSPITAL, NORTH SHORE LU FOREST HILLS HOSPITAL, NORTH SHORE UNIVERSITY HOSPITAL, PARK EAST CARDIOVASCULAR, QUEST DIAGNOSTICS INCORPORATED, CONTINUUM HEALTH PARTNERS, DR. MARK SCHIFFER, DR. CHANCAL MALHOTRA, DR. ERIN MARIE SULLIVAN, DR. MINISHA SOOD, DR. TARA DIRECTOR, DR. JONATHAN I. WARMAN and DR. SHARAD N. SONI,

Defendants.

Cross-Motion: Yes No

Plaintiff MURRAY ELIAS, as executor of the last will and testament of ANNE ELIAS, deceased (“decedent”), and MURRAY ELIAS, individually (“plaintiff”) move for an order striking defendants’ answers for their willful, ongoing, and contumacious refusal to produce written discovery: In the alternative plaintiff moves for an order (1) compelling defendants DR. JEROME TOLBERT (“Dr. Tolbert”), DR. LAWRENCE G. HERBERT (“Dr. Herbert”), DR. IRA S. BLAUFARB (“Dr. Blaufarb” collectively “defendants”) to appear for continued depositions, and (2) compelling defendants to produce all outstanding discovery by a date certain. Plaintiff also requests an “automatic self-executing conditional” order striking defendants’ answers if

defendants fail to comply with the above-requested relief. Plaintiff further seeks to vacate/modify a court order dated May 16, 2018.

Defendants DR. TOLBERT, BETH ISRAEL MEDICAL CENTER s/h/a BETH ISRAEL HOSPITAL (“Beth Israel”), and CONTINUUM HEALTH PARTNERS (“Continuum”) oppose plaintiff’s application, and cross-move for an order, pursuant to CPLR § 3124, compelling plaintiff to provide outstanding discovery. In the alternative, Dr. Tolbert, Beth Israel, and Continuum seek an order, pursuant to CPLR § 3126, granting a “self-executing conditional order” precluding plaintiff from introducing evidence with respect to the claims contained in the complaint unless the outstanding discovery is provided within 20 days.

Defendants NORTH SHORE LIJ FOREST HILLS HOSPITAL (“Forest Hills Hospital”), DR. MARK SCHIFFER (“Dr. Schiffer”) and PARK EAST CARDIOVASCULAR (“Park East”), and QUEST DIAGNOSTICS INCORPORATED (“Quest Diagnostics”) and DR. CHANCHAL MALHOTRA (“Dr. Malhotra”) separately oppose plaintiff’s motion.

BACKGROUND AND ARGUMENTS

In this medical malpractice action, plaintiff alleges that defendants failed to timely diagnose and treat decedent’s cancer/lymphoma, resulting in wrongful death and conscious pain and suffering. On February 27, 2013, plaintiff filed a summons and complaint. Thereafter, issue was joined by the various defendants on March 19, 2013, March 20, 2013, March 21, 2013, March 26, 2013, and April 11, 2013. Pursuant to two compliance conference orders dated May 4, 2016 and September 7, 2016, defendants were directed to produce all guidelines, rules, regulations, policies, procedures, protocols, manuals, and training materials (“rules and regulations”) related to the diagnosis, treatment, examination, testing, and management of cancer/lymphoma.

Plaintiff asserts that defendants have continuously failed to provide written discovery as directed by multiple court orders. Plaintiff contends that he has made at least nine requests for documents since November 23, 2013, and despite four court orders and several reminders, defendants have failed to provide the outstanding discovery. On February 8, 2018, June 18, 2018, and July 5, 2018, plaintiff sent letters to defendants requesting that defendants furnish all discovery. Specifically, plaintiff requests defendants' rules and regulations as these records are essential to the central issues in this case—whether defendants follow their own rules and regulations, did defendants follow their own standards of care with respect to their treatment of these conditions, did defendants properly train and instruct staff with respect to these manuals, and did defendants monitor, supervise, and retain doctors, nurses, and other employees to ensure that these procedures were complied with. Plaintiff also avers that defendants are required by law to create and maintain such records, and that defendants do not deny the existence of these documents.

In addition, plaintiff argues that defendants have engaged in willful and contumacious conduct during defendants' depositions by obstructing plaintiff's attempts to depose defendants. Plaintiff contends that during five depositions, defense counsel made numerous speaking objections, and improperly instructed the physicians not to answer valid questions. Plaintiff also submits that these objections were not based on privilege, but were raised for the sole purpose of frustrating the discovery process and delaying the case. Finally, plaintiff requests a vacatur or modification of the court's May 16, 2018 order directing Dr. Malhotra's deposition to be held on or before July 16, 2018.¹

¹ Dr. Malhotra's deposition was held on August 27, 2018. Therefore, plaintiff's application is moot.

Defendants Dr. Tolbert, Beth Israel, and Continuum oppose plaintiff's application. According to Dr. Tolbert, Beth Israel, and Continuum, the portion of plaintiff's motion seeking written discovery is moot since after a thorough search, Beth Israel is not in possession of any rules and regulations in effect at the time in question, and Beth Israel will not make any arguments at the time of trial regarding the same.

Dr. Tolbert, Beth Israel, and Continuum also assert that plaintiff's request for a continued deposition of Dr. Tolbert should be denied since the objections raised at Dr. Tolbert's deposition were not willful or contumacious. Rather, defendants contend that plaintiff's counsel's questions were confusing, misleading, and irrelevant to the issues at hand. Defendants also maintain that some objections were made to clarify or rephrase a complicated question, and when the questions were rephrased, Dr. Tolbert answered all the questions except for two which were vague and confusing. Dr. Tolbert, however, is amendable to a continued deposition limited to the two unanswered questions, or alternatively, to answer the two questions in the form of an interrogatory.²

Dr. Tolbert, Beth Israel, and Continuum also cross-move for an order compelling plaintiff to provide outstanding discovery, or alternatively, granting an order precluding plaintiff from introducing evidence with respect to the claims contained in the complaint unless the outstanding discovery is provided within 20 days. Dr. Tolbert, Beth Israel, and Continuum contend that they have made demands for discovery on March 2, 2017 and January 3, 2018, and have sent two good faith letters regarding the same on February 1, 2018 and August 6, 2018. At a compliance conference on August 2, 2017, plaintiff was also directed to "provide emails" within 45 days.

² To avoid repetition, the parties' respective arguments relating to the specific objections will be addressed in the discussion section, *infra*.

Defendants aver that without said discovery, the matter cannot move forward, and they will be prejudiced as this discovery relates to issues of liability and damages in this action.

Defendants Drs. Herbert, Blaufarb, Warman, and Soni also oppose plaintiff's motion. Drs. Herbert, Blaufarb, Warman, and Soni contend that they have provided plaintiff with written discovery, including a discovery response dated September 19, 2018, indicating that they do not have any "rules and regulations regarding diagnosis, treatment, examination, history, testing, management of cancer (lymphoma) or for reporting answers." Drs. Herbert, Blaufarb, Warman, and Soni also maintain that they served a response to plaintiff's combined demands on October 24, 2018, and exchanged the exhibits marked at Dr. Herbert's deposition on June 27, 2018.

In addition, Drs. Herbert, Blaufarb, Warman, and Soni argue that plaintiff is not entitled to a continued deposition of Drs. Herbert and Blaufarb since they were both completely and fully deposed.³ According to these defendants, plaintiff's counsel's questions were open-ended, vague, and generalized. Lastly, Drs. Herbert, Blaufarb, Warman, and Soni maintain that plaintiff's counsel's conduct during the depositions was argumentative and mocking.

Defendant Forest Hills Hospital also opposes plaintiff's motion. Forest Hills Hospital argues that plaintiff's motion is procedurally defective since it lacks an affirmation of good faith in violation of 22 NYCRR § 202.7. Forest Hills Hospital also contends that it has made good faith efforts to comply with discovery by timely appearing at all depositions, and not engaging in "obstructionist" deposition tactics as alleged by plaintiff.

In addition, Forest Hills Hospital argues that plaintiff's demand for "any guidelines, rules, regulations, policies, protocols, procedures, manuals, training materials in effect at relevant times

³ See, Footnote 1, *supra*.

regarding the diagnosis, treatment, examination, history, testing, management of cancer/lymphoma or for reporting cancers” is overbroad, burdensome, and vague. Forest Hills Hospital contends that plaintiff has not provided any specificity regarding the necessity of his demand as it relates to the treatment of cancer/lymphoma at Forest Hills Hospital. Forest Hills Hospital also avers that while plaintiff’s demand is focused on its emergency room and in-patient facilities, it has several different departments, facilities, and types of care professionals, of which the overwhelming majority never had contact with decedent. Notwithstanding the same, Forest Hills Hospital submits that it is diligently working to ascertain the existence of, or the actual documentation relevant to plaintiff’s demand.

Lastly, Forest Hills Hospital advises that plaintiff’s request that the court vacate/modify the May 16, 2018 order and reschedule Dr. Malhotra’s deposition is moot as the deposition of Dr. Malhotra was held on August 27, 2018.

Defendants Dr. Schiffer and Park East also oppose plaintiff’s motion. Dr. Schiffer and Park East assert that plaintiff’s motion is moot since plaintiff has not identified any discovery that they still owe, or that their conduct during defendants’ depositions warrants the relief plaintiff seeks. Rather, Dr. Schiffer and Park East contend that they have provided all discovery sought by plaintiff, including an affidavit concerning their policies and rules involving the care, treatment, and diagnosis of cancer/lymphoma. Dr. Schiffer and Park East also assert that they provided plaintiff with a CD containing their medical records on September 29, 2017, and a copy of their billing records on September 4, 2018. Finally, Dr. Schiffer and Park East posit that the deposition of Dr. Schiffer is not the subject of plaintiff’s motion.

Defendants Quest Diagnostics and Dr. Malhotra also oppose plaintiff’s motion. Quest Diagnostics and Dr. Malhotra argue that plaintiff’s demand for its policies and procedures is vague,

overbroad, improper, and not reasonably calculated to lead to admissible and/or relevant evidence. These defendants explain that the only issue pertaining to them is whether Dr. Malhotra's interpretation of decedent's pathology slide comported with the standard of pathological care. In that regard, Quest Diagnostics and Dr. Malhotra submit that the standard of care will be established by expert testimony at trial, not by their internal policies and procedures. Quest Diagnostics and Dr. Malhotra further posit that plaintiff does not have a good faith basis to claim that the policies and procedures have any bearing on Dr. Malhotra's review, diagnosis, or reporting of the pathology slide at issue, and therefore, plaintiff's request amounts to a fishing expedition.

Notwithstanding the arguments above, Quest Diagnostics submits that it is willing to provide a number of responsive documents to plaintiff's request, but because it is a business corporation, its standard operating procedures are intellectual property and proprietary, and are kept confidential. As such, Quest Diagnostics avers that it will disclose documents that are responsive to the court's order upon an execution of a confidentiality agreement. Lastly, Quest Diagnostics and Dr. Malhotra assert that they have provided plaintiff with medical records.

In reply and opposition to Dr. Tolbert, Beth Israel, and Continuum's cross-motion for discovery, plaintiff argues that since the filing of the motion, there have been additional depositions in which defense counsels continued to obstruct the depositions. Specifically, plaintiff notes that Dr. Malhotra's deposition exemplifies defendants' bad faith since Dr. Malhotra's counsel admitted to withholding evidence, misstated the law of the case, and engaged in name-calling, for which he should be sanctioned. Plaintiff also reiterates that Drs. Herbert and Blaufarb should be compelled to appear for continued depositions.

Additionally, plaintiff argues that Quest Diagnostics and Dr. Malhotra failed to provide a certified copy of decedent's records, charts, diagnostic films/studies, pathology slides, although Dr. Malhotra's attorney admitted during Dr. Malhotra's deposition that he is in possession of the pathology slides for the last five years. Plaintiff also argues that because defendants admit that they do not have any rules and regulations, defendants must be precluded from introducing such documents or referring to the existence of such documents at trial.

In sur-reply,⁴ Quest Diagnostics and Dr. Malhotra argue that plaintiff failed to demonstrate how he was prejudiced during Dr. Malhotra's deposition. They also assert that their objections during Dr. Malhotra's testimony did not violate any rule or ethical canon. Quest Diagnostics and Dr. Malhotra further maintain that plaintiff's claim that he repeatedly asked for the pathology slides is false since they would have provided the slides for review upon an execution of a chain of custody agreement. Nonetheless, Quest Diagnostics and Dr. Malhotra contend that they have sent the slides to plaintiff following a court conference on October 31, 2018.

In opposition to Dr. Tolbert, Dr. Blaufarb, and Beth Israel Hospital's cross-motion for discovery, plaintiff argues that he has previously provided defendants with the demanded discovery on January 14, 2019, including authorizations, a copy of decedent's death certificate, a copy of the funeral and cremation records, and the last known address of Wendy Sonin ("Ms. Sonin"). Plaintiff also avers that on April 2, 2014, he provided defendants with decedent's autopsy report, decedent's death certificate, funeral and cremation records, letters testamentary, a decree granting probate, and a certificate of appointment of executor. Additionally, plaintiff maintains

⁴ Quest Diagnostics and Dr. Malhotra were granted permission by the Hon. Justice Judith McMahon on October 31, 2018 to submit a sur-reply.

that on November 11, 2013, March 21, 2014, and April 7, 2015, he provided additional authorizations to defendants, including authorizations for Empire Blue Cross/Blue Shield, Emblem Health/HIP Health Plan, Medicare, and Medicaid.

Plaintiff further argues that defendants have waived their right to information pertaining to decedent's friends and relatives as this demand does not appear in defendants' discovery demands. Plaintiff also asserts that defendants have not justified seeking the identity and addresses of decedent's friends and relatives. Lastly, plaintiff argues that he is not obligated to provide defendants with emails to/from Ms. Sonin. Specifically, plaintiff highlights that despite the August 2, 2017 court order that directs plaintiff to comply with an order dated April 12, 2017, plaintiff has informed defendants that the order does not permit defendants to obtain such emails, and that the court explicitly stated that defendants are not entitled to such emails.

In reply, Dr. Tolbert, Beth Israel, and Continuum argue that contrary to plaintiff's claim, the August 2, 2017 order does not indicate whether the court has previously ruled on this issue. According to these defendants, while plaintiff claims that I orally ruled on this issue at a status conference on April 12, 2017, the written order that followed does not mention Ms. Sonin's deposition or emails. These defendants also assert that despite plaintiff's claim that they are not entitled to Ms. Sonin's deposition, plaintiff has provided defendants with Ms. Sonin's last known address, presumably so that defendants can subpoena her for a deposition.

Moreover, Dr. Tolbert, Beth Israel, and Continuum argue that they are entitled to a deposition of Ms. Sonin and any emails between Ms. Sonin and plaintiff as plaintiff testified that he spoke with Ms. Sonin about decedent during the last few weeks of decedent's life. Specifically, defendants highlight that plaintiff testified that Ms. Sonin recommended that he have decedent's (his sister) autopsy report sent to plaintiff's counsel.

Finally, Dr. Tolbert, Beth Israel, and Continuum withdraw the portions of their cross-motion seeking decedent's death certificate and a copy of the funeral and cremation bill as they were previously provided. However, these defendants assert that they cannot obtain decedent's lien information as it must be obtained by plaintiff, and then provided to them.

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 [§ic] 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

Although plaintiff's motion lacks an affirmation of good faith, the court will nonetheless consider plaintiff's motion, and decide the motion on its merits. Pursuant to Uniform Court Rule § 202.7(a)(2), a party making a discovery-related motion must submit an affirmation stating that, "[C]ounsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Here, however, plaintiff's failure to submit an affirmation of good faith is not fatal, especially in light of plaintiff's prior attempts to obtain discovery from defendants via correspondence and multiple court orders (*see, N. Leasing Sys., Inc. v. Estate of Turner*, 82 A.D.3d 490, 490 [1st Dept. 2011] ["Defendants' argument that plaintiff's failure to include an affirmation of good faith pursuant to 22 NYCRR [§] 202.7 should be fatal to its cross motion for sanctions, is unavailing [as the] record indicates that plaintiff attempted, both under the auspices of the court and out of court, to reach an accommodation with defendants."]; *see also, Carrasquillo ex rel. Rivera v. Netsloh Realty Corp.*, 279 A.D.2d 334, 334 [1st Dept. 2001] ["The failure of defendants to include an affirmation of good faith is excusable because any effort to resolve the present dispute non-judicially would have been 'futile.'"] [citations omitted]).

a. Plaintiff's Demand for Rules and Regulations

Although Dr. Tolbert, Beth Israel, and Continuum assert that Beth Israel will not make arguments at trial with respect its rules and regulations, this argument does not preclude plaintiff's entitlement to such records in order to determine, *inter alia*, whether defendants followed their rules and regulations and whether defendants deviated from the standard of care with respect to

these rules and regulations. However, to the extent that Dr. Tolbert, Beth Israel, and Continuum claim that Beth Israel is not in possession of any rules and regulations at the time in question, Dr. Tolbert, Beth Israel, and Continuum are directed to provide an affidavit to that effect, including their efforts to obtain any rules and regulations, within 30 days of this order.

Similarly, based on Drs. Herbert, Blaufarb, Warman, and Soni's representation that they do not have any rules and regulations regarding the diagnosis, treatment, examination, history, testing, and management of cancer (lymphoma), they are directed to provide an affidavit to that effect, including their efforts to obtain any rules and regulations, within 30 days of this order.

Additionally, as Forest Hills Hospital submits that it is working to ascertain the existence of or the actual documentation of its rules and regulations, Forest Hills Hospital is directed to provide any rules and regulations in effect at relevant times regarding the diagnosis, treatment, examination, history, testing, and management of cancer/lymphoma within 30 days of this order. Should a search be conducted that results in a failure to locate such documents, Forest Hills Hospital is directed to provide an affidavit detailing their efforts to obtain the same within 30 days of this order.

Moreover, the branch of plaintiff's motion seeking to obtain rules and regulations from Dr. Schiffer and Park East is denied as moot as Dr. Schiffer and Park East have asserted that they have previously provided plaintiff with an affidavit concerning their rules and regulations.

Furthermore, Quest Diagnostics and Dr. Malhotra are directed to provide plaintiff with a certified copy of all records, charts, and diagnostic films/studies within 30 days of this order. Quest Diagnostics and Dr. Malhotra are also directed to provide plaintiff with a list of Anatomic Pathology standard operating procedures currently in effect at the Teterboro laboratory within 30

days of this order in response to the court's directive to provide a "Table of Contents."⁵ However, as Quest Diagnostics and Dr. Malhotra have asserted that they have previously provided plaintiff with decedent's pathology slides for review, plaintiff's request for the same is denied as moot.

b. *Continued Depositions of Drs. Tolbert, Herbert and Blaufarb*

"[T]he scope of examination on deposition is broader than what may be admissible on trial" (*White v. Martins*, 100 A.D.2d 805, 805 [1st Dept. 1984] citing CPLR § 3113(b)). "In general[,] the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR § 3115; the statute contemplates that 'the deposition shall proceed subject to the right of a person to apply for a protective order . . . But there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered'" (*id.* [citations omitted]).

Based on a review of the deposition transcripts, including the questions asked and the objections raised, Drs. Tolbert, Herbert and Blaufarb are directed to appear for a continued deposition limited in scope to any unanswered questions, and any subsequent follow-up questions derived from the initial unanswered questions under the supervision of a court referee within 45 days of this order (*Parker v. Ollivierre*, 60 A.D.3d 1023, 1023–24 [2d Dept. 2009] [granting a further deposition of plaintiff under the supervision of a referee where "plaintiff's counsel acted improperly at the plaintiff's deposition, among other things, by making 'speaking objections,' correcting the plaintiff's testimony, and directing the plaintiff on a number of occasions not to

⁵ Plaintiff is encouraged to review the affidavit of Jane Seitz attached to Quest Diagnostics and Dr. Malhotra's opposition dated October 24, 2018.

answer certain questions. “The questions were designed to elicit information which was material and necessary to the appellant’s defense of this action and the directions not to answer them were not otherwise authorized by 22 NYCRR § 221.2.” [citations omitted]; *Lowitt v. Burton I. Korelitz, M.D., P.C.*, 152 A.D.2d 506, 506 [1st Dept. 1989] [“In view of the hostility and lack of cooperation exhibited by these parties, we find the appointment of a referee to supervise further deposition disclosure in this action an appropriate measure.”]; *Kolomick v. Kolomick*, 133 A.D.2d 69, 70 [2d Dept. 1987] [appointing a referee to supervise the depositions where the record indicated that “any progress in completing the simplest steps of litigation and the parties’ depositions would have been impossible”]). The parties are further directed to split the cost of the continued depositions.

II. Dr. Tolbert, Beth Israel, and Continuum’s Cross-Motion

Plaintiff is directed to respond to and/or provide the discovery requested by Dr. Tolbert, Beth Israel, and Continuum’s March 2, 2017 Notice to Produce and January 3, 2018 Demand to Produce within 30 days of this order. Plaintiff is also directed to obtain decedent’s lien information, and provide the same directly to Dr. Tolbert, Beth Israel, and Continuum within 30 days of this order, as an authorization to obtain the same will not suffice.

However, defendants’ request for information pertaining to decedent’s friends and relatives, including the identity and addresses of decedent’s friends and relatives, is denied as this demand is vague and overbroad. Moreover, defendants have failed to show the relevance and materiality of this information as it pertains to the allegations in this case, especially in light of the lack of specificity as to which friends and relatives’ information defendants seek.

Similarly, defendants’ request for emails to/from Ms. Sonin and a deposition of Ms. Sonin is denied. Despite the parties’ disagreement as to an oral ruling on this issue on April 12, 2017,

and a vague reference to comply with the April 12, 2017 order, the August 2, 2017 order on its face does not explicitly compel Ms. Sonin's deposition or plaintiff's production of emails to/from Ms. Sonin.⁶ Moreover, defendants' argument that plaintiff testified that he spoke with Ms. Sonin about decedent during the last few weeks of decedent's life is unavailing as it does not demonstrate the relevance or materiality of Ms. Sonin's deposition or emails to any particular issue in this case.

III. Further Relief

While the parties have engaged in a hostile discovery process, where both sides exhibit non-cooperative conduct, the drastic remedy of striking defendants' answers is not warranted at this juncture. Defendants' conduct does not rise to the level of willful or contumacious, especially in light of plaintiff's failure to timely provide discovery responses (*Bako v. VT. Trucking Co.*, 143 A.D.2d 561 [1st Dept. 1999]). Similarly, the court declines to sanction Quest Diagnostics and Dr. Malhotra for their conduct during Dr. Malhotra's deposition as there has been no evidence that their conduct was willful, contumacious, or discharged in bad faith (*Hernandez v. City of New York*, 100 A.D.3d 433, 434 [1st Dept. 2012] ["plaintiff failed to make a clear showing that defense counsel's conduct during a deposition, or failure to produce the deponent for further deposition, constituted willful, contumacious, or bad-faith conduct"]). Moreover, the court takes notice of all participating counsel's conduct and decorum during the subject depositions, including plaintiff's counsel.

⁶ The August 2, 2017 order states: "Plaintiff to comply with Order dated 4/12/17 and all previous notices to produce to the extent not already provided/responded, i.e., no EBT/emails to/from Wendy Sonin, etc. within 45 days."

Furthermore, plaintiff's request that defendants be precluded from introducing evidence of their rules and regulations at the time of trial based on defendants' denial of the existence of such documents is a matter best left to the discretion of the trial judge.

As such, it is hereby

ORDERED that plaintiff's application for an order striking defendants' answers is denied; and it is further

ORDERED that the parties are directed to conduct limited continued depositions of Drs. Tolbert, Herbert, and Blaufarb under the supervision of a court referee. The parties are to contact Arupa Chung-A-Hing, Esq. (aachunga@nycourts.gov) to set a date for the continued depositions; and it is further

ORDERED that plaintiff's application for an "automatic self-executing conditional" order striking defendants' answers if defendants fail to comply with discovery demands is denied; and it is further

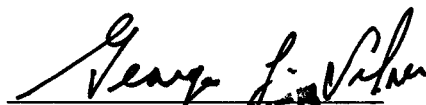
ORDERED that plaintiff's request that the court vacate/modify the May 16, 2018 order is denied as moot; and it is further

ORDERED that Dr. Tolbert, Beth Israel, and Continuum's cross-motion for a "self-executing conditional order" precluding plaintiff from introducing evidence with respect to the claims contained in the complaint is denied to the extent indicated above; and it is further

ORDERED that the parties are directed to appear for a compliance conference on September 10, 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: June 13, 2019


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