

<b>Akter v New York City Health and Hosp. Corp.</b>
2019 NY Slip Op 32207(U)
March 13, 2019
Supreme Court, New York County
Docket Number: 20268/2018
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Index №. 20268/2018

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 10**

-----X

**AIRIN AKTER**

**Index №. 20268/2018**

**Plaintiff**

**-against-**

**NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION**

**Defendants**

-----X

**GEORGE J. SILVER, J.:**

In this medical malpractice action, defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“defendant”) moves, pursuant to CPLR §3126, for an order dismissing this action in its entirety for plaintiff AIRIN AKTER’s (“plaintiff”) repeated failure to comply with both the preliminary and compliance conference orders.

In this lawsuit, plaintiff alleges that the defendant failed to timely diagnose and appropriately treat a blood clot in the veins of her right upper extremity that developed due to the placement of an infiltrating intravenous line in her right distal forearm/wrist. Because of the same, plaintiff alleges that she suffers from severe pain and tenderness along the proximal radial aspect of her right arm, as well as decreased flexion strength and sensation of the right hand and wrist, and permanent scarring, disfigurement, and deformity of her right arm.

This action was commenced by the filing of a summons and complaint on January 9, 2018. Issue was joined by service of a verified answer and demand for a bill of particulars on behalf of defendant on February 1, 2018.

A preliminary conference was held on August 13, 2018. Pursuant to the conference order that followed, plaintiff’s deposition was to be held on or before October 19, 2018, and defendant’s deposition was to be held on or before November 2, 2018.<sup>1</sup> Plaintiff’s deposition did not proceed on October 19, 2018 as ordered.

<sup>1</sup> Plaintiff was instructed to designate a witness on behalf of defendant 30 days prior to defendant’s deposition.

Index No. 20268/2018

Thereafter, a compliance conference was held on November 5, 2018 and an order was set forth pursuant to which plaintiff's deposition was to be held on January 3, 2019. The deposition of the defendant was to be held on January 24, 2019.<sup>2</sup> The order further provided no adjournments of the depositions without prior court approval.

Plaintiff appeared for plaintiff's deposition, but failed to designate a witness on or before December 24, 2018 in accordance with the November 5, 2018 court order.

On January 3, 2019, defendant faxed a letter to the court and e-filed the same, advising that plaintiff had not yet designated a witness and, as such, the deposition of defendant could not proceed on January 24, 2019.

On January 14, 2019, all parties appeared before this court for a further compliance conference. At that time plaintiff still had not designated a witness to appear on behalf of defendant, thereby resulting in the instant motion practice by Order to Show Cause.

Pursuant to CPLR §3126 this court can, in its discretion, sanction plaintiff for his failure to comply with discovery. However, to be entitled to the drastic relief of striking plaintiff's complaint, a defendant must conclusively demonstrate that plaintiff's failure designate a witness on behalf of defendant and hold a scheduled deposition was willful, contumacious, or due to bad faith. The burden then shifts to plaintiff to demonstrate a reasonable excuse for the noncompliance (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [1st Dept 2004])[“A court may strike a [pleading] only when the moving party establishes a clear showing that the failure to comply is willful, contumacious or in bad faith. The burden then shifts to the nonmoving party to demonstrate a reasonable excuse”]. Although the court has the discretion to determine the nature and degree of the penalty to impose for failure to comply with discovery, it is well-settled that penalizing a noncompliant party by striking its pleading is extreme, and should only be levied where (1) failure has been willful and contumacious; and (2) that such behavior can be fairly attributed to defendants, rather than defendants' counsel (*see Lowitt v Burton I. Korelitz, M.D., P.C.*, 152 AD2d 506, 507 [1st Dept 1989])[“Striking a plaintiff's pleading is a drastic remedy and is inappropriate when the contumacious conduct or noncompliance is attributable to [plaintiff's] counsel rather than to the [plaintiff]”]; *see also Stathoudakes v Kelmar Contracting Corp.*, 147 AD2d 690 [2d Dept 1989] [noncompliant party's counsel “should be afforded another chance to provide the requested documentary information or, if they cannot, to supply a satisfactory explanation of their efforts to obtain that information”]). A less drastic remedy to striking a party's pleading is compelling that party to engage in requested discovery pursuant to CPLR §3124.

Here, both the preliminary conference order and compliance conference orders required that plaintiff designate a witness within 30 days prior to the defendant's deposition. Plaintiff failed to designate said witness by December 24, 2018 even though the compliance conference order of

---

<sup>2</sup> Plaintiff was instructed to designate a witness to be deposed on behalf of the defendant within 30 days prior to defendant's deposition, or by December 24, 2018.

Index No. 20268/2018

November 5, 2018 directed that depositions were to proceed and that no adjournments were permitted without court approval.

Likewise, plaintiff failed to seek permission from the court to adjourn defendant's deposition even after defendant's counsel's office wrote to the court on January 10, 2019. Instead, plaintiff's counsel did nothing and offered no reasonable excuse to the court at the conference on January 14, 2019.

In opposition, plaintiff states that in accordance with the November 5, 2018 compliance conference order, on November 12, 2018, plaintiff designated that "[p]laintiff wishes to depose the nurse or IV technician who performed the subject infiltration on behalf of defendant New York City Health & Hospitals Corporation [Lincoln Hospital]." Because defendant did not have a document indicating who that nurse was at the time of the compliance conference, plaintiff states that plaintiff was unable to designate a witness to appear on behalf of defendant with further specificity. Plaintiff further highlights that plaintiff's conduct was not willful and contumacious insofar as plaintiff appeared for his deposition, as scheduled, and made attempts to designate a witness to appear on behalf of defendant, albeit to no avail. Finally, plaintiff states that because the witness plaintiff wishes to depose has been identified, defendant's deposition can be scheduled, and can proceed without further delay.

Dismissal of a complaint has been viewed as an improvident exercise of a court's discretion in the absence of a conclusive showing that a failure to adhere to discovery set forth was "willful, contumacious or in bad faith" (*Ellis v. Park*, 93 AD3d 502 [1st Dept 2012]). Moreover, the First Department recently held that "warnings in prior court orders that the deposition was not to be adjourned is not notice to plaintiffs that dismissal of the complaint may result should it not go forward" (*Michaluk v. New York City Health and Hospitals Corporation*, 2019 N.Y. Slip Op. 01139 [1st Dept 2019]).

As such, the court finds that dismissal is unwarranted based on the record before it. To be sure, plaintiff has appeared for plaintiff's deposition, and earnest attempts appear to be underway to schedule defendant's deposition without further delay. However, plaintiff is cautioned that any delay in designating and thereafter holding defendant's deposition may result in the dismissal of this case.

Accordingly, it is hereby

ORDERED that defendant's motion, by Order to Show Cause, is granted to the extent that plaintiff is directed to designate a witness to appear on behalf of defendant within 15 days of entry of this order; and it is further

ORDERED that the designated witness on behalf of defendant is directed to appear for a deposition within 45 days of receipt of plaintiff's designation; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon plaintiff within 10 days of entry; and it is further

Index No. 20268/2018

ORDERED that the failure to comply with the above-stated directives may result in the court taking appropriate action, including dismissal, at the next conference; and it is further

ORDERED that the parties are directed to appear for a conference before the court in Room 600 at 851 Grand Concourse, Bronx County, on ~~Apr. 3, 2019~~ at 9:30 AM to ensure compliance with this court's directive and facilitate further discovery.

March 13, 2019

George J. Silber