

**Mclane v Visiting Nurse Servs. of N.Y.**

2019 NY Slip Op 32320(U)

June 12, 2019

Supreme Court, Bronx County

Docket Number: 25827/2018E

Judge: George J. Silver

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 No. 25827/2018E

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 19A**

**LORI Y. MCLANE**

Index No. 25827/2018E

**-against-**

**Hon. GEORGE J. SILVER**

Justice Supreme Court

**VISITING NURSE SERVICES OF NEW YORK,  
VISITING NURSE SERVICES OF NEW YORK,  
COMMUNITY HEALTH SERVICES,  
VISITING NURSE SERVICES OF NEW YORK  
HOME CARE, VISITING NURSE SERVICES  
OF NEW YORK HOME CARE II, MINI  
MATHEW, and MONTEFIORE MEDICAL  
CENTER,**

-----X

The following papers numbered 1 to 1 were read on this motion (Seq. No.: 001):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1
Answering Affidavit and Exhibits	No(s).	

The following papers numbered 1 to 1 were read on this motion (Seq. No.: 002):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1
Answering Affidavit and Exhibits	No(s).	

**HON. GEORGE J. SILVER:**

In the instant action, defendants, MONTEFIORE MEDICAL CENTER ("Montefiore"), and VISITING NURSE SERVICE OF NEW YORK HOME CARE II d/b/a VISITING NURSE SERVICE OF NEW YORK HOME CARE ("Visiting Nurse Service"), (collectively "defendants"), separately move pursuant to CPLR §§ 3126 and 3041 to dismiss plaintiff's complaint in this medical malpractice action based upon plaintiff's alleged failure to provide discovery and a bill of particulars. Alternatively, defendants move pursuant to CPLR §3124 for an order compelling plaintiff to provide all outstanding discovery or face dismissal. Plaintiff orally opposes the respective motions, but has submitted no written opposition.

This action was commenced by service of a summons and complaint dated May 17, 2018. Plaintiff's complaint seeks damages for allegations of medical and nursing malpractice with respect to treatment rendered to plaintiff. In support of their instant application, defendants contend that to date, plaintiff has failed to provide defendants with a bill of particulars or a response to defendants' demands for authorizations. In response, plaintiff argued before the court on February 27, 2019, and again on April 24, 2019 that while plaintiff is willing to provide defendants with a bill of particulars, and HIPAA compliant authorizations, plaintiff is unwilling to provide authorizations with Section 9(a) of those HIPAA authorizations initialized. Section 9(a) permits the release of a plaintiff's private medical information regarding alcohol/drug treatment, mental health information and HIV-related information. Defendants contend that as a matter of practicality, requests for the production of medical records are often denied on account of individuals' failure to initialize Section 9(a).

Motion is Respectfully Referred to Justice:  
Dated:

25827/18E

## DISCUSSION

CPLR §3126, which details penalties for failing to comply with discovery, states: If any party, or a person who at the time of a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

While the penalty of striking a pleading for failure to comply with disclosure is extreme, courts have nonetheless held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 [1st Dept. 1990]; *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept.], *lv denied*, 88 NY2d 802 [1996]) [disobedience of a series of court orders directing discovery warranted striking of pleading]. As stated in *Abouzeid v Cadogan*, 291 AD2d 423, 424 (2d Dept. 2002): "Where a party disobeys a court order, and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of a pleading is within the broad discretion of the trial court."

Moreover, a party is entitled to demand a bill of particulars pursuant to CPLR §3041 "If a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties . . ." (CPLR §3042[c]). However, the law favors a disposition on the merits (*Catarine v. Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept. 2002]). As such, The sanction of "striking the pleading should be restricted to occasions when the failure to comply with or disclose is found to be willful, contumacious or in bad faith" (*Cespedes v. Mike & Jac Trucking Corp.*, 305 AD2d 222, 222 [1st Dept. 2003]).

Finally, defendants must meet their burden of showing a "compelling need" for medical records concerning the items listed in Section 9(a) of a HIPAA authorization, including demands concerning HIV. Where defendants fail to submit evidence that would establish a connection between a plaintiff's purported HIV status and the claims asserted and damages sought in a lawsuit, the request for an order compelling a plaintiff to initial Section 9(a) should be denied (*see Public Health Law § 2785 [2] [a]*; *James v 1620 Westchester Ave. LLC*, 147 AD3d 575 [1st Dept. 2017]; *Budano v Gurdon*, 97 AD3d 497 [1st Dept. 2012]; *see also Abdur-Rahman v Pollari*, 107 AD3d 452 [1st Dept. 2013]).

NYSCEF DOC. NO. 39  
25827/18E

RECEIVED NYSCEF: 06/14/2019

Here, defendants have failed to show that dismissal is warranted on account of plaintiff's failure to provide a bill of particulars. To be sure, plaintiff has made an effort to serve defendants with bills of particulars and responses to their discovery demands. Under such a circumstance, the appropriate relief is not to strike the pleading, but to compel compliance in the first instance. Accordingly, the court directs that plaintiff provide defendants with a bills of particulars within 30 days of this court's order. Defendants reserve their right to make an oral application for dismissal in the event that plaintiff fails to comply with this court's directive.

With respect to defendants' demand that plaintiff to provide HIPAA-compliant authorizations, plaintiff's unresponsiveness is not derived from wanton disregard, but rather is premised on plaintiff's privacy-related concerns. Notably, this court finds that it is unnecessary for plaintiff to initial all parts of section 9(a) of the HIPAA authorization form. The form specifically provides the option of including or omitting records for alcohol/drug treatment, mental health information and HIV-related information, and should be processed accordingly. Nothing in this record indicates that records for alcohol/drug treatment and HIV-related information are relevant to this action. Moreover, defendants have failed to meet their burden of showing that there is a "compelling need" for medical records concerning the items listed in Section 9(a) of the HIPAA authorization form (see *James*, 147 AD3d 575, *supra*). Similarly, defendants have failed to meet their burden of showing that "the interests of justice significantly outweigh the need for confidentiality" such to permit discovery of mental health, alcohol abuse, or substance abuse records (Mental Hygiene Law §§ 33.13 [c] [1]; 22.05 [b]; see also *Keith v Forest Labs., Inc.*, 72 AD3d 519 [1st Dept. 2010]; *Catherine D. v Judy*, 38 AD3d 258 [1st Dept. 2007]).

For the foregoing reasons, it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiff is directed to provide defendants with a bill of particulars specific to the alleged malpractice with respect to each individual defendant, in accordance with CPLR §3041, within 30 days of this court's order; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiff is directed to provide defendants with HIPAA-compliant authorizations pursuant to Visiting Nurse Services Combined Demand dated July 13, 2018 and Montefiore's Combined Demand dated July 26, 2018, except that plaintiff is permitted to provide said authorizations without Section 9(a) the HIPAA authorization form initialized; and it is further

ORDERED that the parties shall appear before the court in Part 19A, 851 Grand Concourse, Bronx, New York, Room 600, on August 14, 2019, at 9:30 a.m. for a preliminary conference.

This constitutes the decision and order of the court.

Dated: June 12, 2019

Hon. George J. Silver  
GEORGE J. SILVER, J.S.C.

- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
- 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER