

Lazar v Lorich

2019 NY Slip Op 33879(U)

December 17, 2019

Supreme Court, New York County

Docket Number: 805037/2015

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK —NEW YORK COUNTY

PRESENT: GEORGE J. SILVER

Justice

ADOR LAZAR,

Index No. 805037/2015
Motion Seq. No. 003 & 004

Plaintiff,

- v -

DECISION & ORDER

**DEBORAH A. CLARK LORICH, as Preliminary
Executor of the Estate of DEAN G. LORICH, M.D.,
DENIS NAM, M.D., BENJAMIN RICCIARDI,
M.D., VENU NEMANI, M.D., NEW YORK
PRESBYTERIAN/WEILL CORNELL MEDICAL
CENTER and HOSPITAL FOR SPECIAL
SURGERY,**

Defendants.

Cross-Motion: Yes No

Defendants DEBORAH A. CLARK LORICH, as preliminary executor of the estate of DEAN G. LORICH, M.D. (“Dr. Lorich”) BENJAMIN RICCIARDI, M.D., VENU NEMANI, M.D., and HOSPITAL FOR SPECIAL SURGERY (“defendants”), move pursuant to CPLR § 3126(3), dismissing plaintiff ADOR LAZAR’s (“plaintiff”) complaint with prejudice for plaintiff’s willful failure to produce discovery in violation of multiple court orders.¹

Defendant NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER (“NYPH”) separately moves² for an order requesting the same relief.³ Plaintiff advances identical opposition to both motions. For the reasons discussed below, the court denies the respective motions.⁴

¹ Motion Seq. No. 003.

² Motion Seq. No. 004.

³ All moving defendants will collectively be referred to as “defendants” herein.

⁴ The court will address both motions collectively in the decision herein.

BACKGROUND AND ARGUMENTS

This action was commenced with the filing of plaintiff's summons and complaint on January 28, 2015. Plaintiff alleges that defendants failed to properly treat his left hip fracture. On April 10, 2015 and May 15, 2015, defendants filed answers, and on March 25, 2016, NYPH filed an answer. Along with its answer, NYPH served plaintiff with initial discovery demands, including a demand for verified bills of particulars. Plaintiff failed to provide a response.

On August 14, 2015, October 30, 2015, December 18, 2015, and December 31, 2015, defendants sent good faith letters to plaintiff requesting compliance with their initial discovery demands. On January 27, 2016, plaintiff filed a motion requesting an extension of time to file a notice of medical malpractice. On February 4, 2016 and February 16, 2016, defendants and NYPH, respectively, filed cross-motions to dismiss the complaint due to outstanding discovery.⁵ On March 10, 2016, plaintiff served defendants with bills of particulars. On March 17, 2016, a preliminary conference was held.

At a compliance conference on May 18, 2016, the court directed plaintiff to provide, *inter alia*, authorizations and copies of plaintiff's tax returns and actual collateral source records. On June 9, 2016 and June 29, 2016, defendants sent plaintiff good faith letters requesting that plaintiff comply with the prior court orders. On October 20, 2016 and January 19, 2017, the court again directed plaintiff to provide the same items of discovery. Plaintiff failed to comply.

On January 27, 2017 and May 1, 2017, defendants sent plaintiff good faith letters requesting that plaintiff comply with the court's orders. At a compliance conference on May 18, 2017, plaintiff was directed to provide, *inter alia*, authorizations, copies of actual collateral source records, documents from Lifespring Financial, copies of plaintiff's life insurance policy, a response to defendants' demand for supplemental bills of particulars, and tax returns from 2013 to present. Plaintiff failed to comply.

On May 22, 2017, defendants sent plaintiff another good faith letter. On August 14, 2017, plaintiff filed a motion to compel the deposition of all parties, and on October 10, 2017, defendants filed a cross-motion to dismiss. On October 31, 2017, the parties resolved the motions via a so-ordered stipulation, which directed plaintiff to provide outstanding discovery. Plaintiff failed to comply.

⁵ The motions were resolved pursuant to an order dated October 31, 2017, which directed plaintiff to provide outstanding discovery.

On December 12, 2017, this matter was stayed due to the death of Dr. Lorich. During the pendency of the stay, defendants sent plaintiff additional good faith letters to attempt to proceed with discovery. At a status conference on November 20, 2018, the parties stipulated to substitute Dr. Lorich's estate as defendant in this matter, thus lifting the stay. Plaintiff was also directed to comply with court-ordered discovery, and to provide an affidavit detailing his efforts to obtain his treatment records from Mexico. Plaintiff failed to comply.

On December 12, 2018 and February 4, 2019, NYPH sent plaintiff two good faith letters requesting that plaintiff comply with outstanding discovery. At a compliance conference on February 5, 2019, plaintiff was directed to provide an affidavit as to his efforts to obtain his treatment records from Mexico, as well as respond to outstanding discovery. Plaintiff failed to comply.

On March 4, 2019, defendants sent plaintiff another good faith letter. At a compliance conference on March 26, 2019, plaintiff was directed to comply with prior court orders. Plaintiff failed to comply. On May 23, 2019 and May 24, 2019, defendants sent plaintiff good faith letters requesting that plaintiff provide outstanding discovery.

At a compliance conference on May 28, 2019, I directed defendants and NYPH to move to dismiss plaintiff's complaint due to outstanding discovery. On May 29, 2019, plaintiff provided copies of his business and personal tax returns from 2013 to 2017. However, NYPH asserts that the tax returns are limited since they do not provide information relevant to plaintiff's claim for \$6 million in past earnings, and \$10 million in loss of future earning capacity.

Defendants argue that plaintiff has refused to provide discovery, stalled discovery, and violated nine court orders, eight court conference orders, and one motion decision order, which required plaintiff to provide outstanding discovery. Defendants also posit that plaintiff has not offered any excuse for his failure to comply with discovery.

Separately, NYPH argues that plaintiff has failed to provide outstanding discovery in violation of eight prior court orders and a prior decision that directed plaintiff to provide discovery. NYPH contends that the requested discovery is relevant and material to plaintiff's allegations and the "extensive amount of lost earnings claimed." NYPH also avers that plaintiff's non-compliance has hindered and prejudiced its defense of this action, especially since the parties cannot proceed with plaintiff's deposition until plaintiff provides outstanding discovery. NYPH further submits that plaintiff has not offered any excuse for his failure to provide discovery.

In opposition to the respective motions, plaintiff argues that he has provided all outstanding discovery that is “physically available.” Plaintiff contends that to the extent that any discovery has not been provided, such discovery either is physically not in existence, or has not been previously requested. In the interest of brevity, the substance of plaintiff’s argument with respect to each individualized item of outstanding discovery will be discussed in detail below.

In reply, defendants state that they understand that tax returns for 2019 have not been filed, but that they were unaware that plaintiff had received an extension of time to file his 2018 tax returns. As such, defendants request that plaintiff provide the date by which plaintiff must file his 2018 tax returns, and a copy of plaintiff’s 2018 returns with statements and schedules within 14 days of filing. The remainder of defendants’ reply will be addressed in the discuss section below.

In reply, NYPH reiterates that plaintiff has not offered a reasonable excuse as to why he has not complied with discovery. NYPH contends that contrary to plaintiff’s argument that he provided authorizations in May of 2016 and July of 2017, the court has issued a subsequent order on October 31, 2017 directing plaintiff to provide new authorizations as plaintiff’s initial authorizations were defective. NYPH also advises that discovery remains outstanding, including records from Drs. Joseph Lane (“Dr. Lane”) and Flores Soto Juan Ricardo (“Dr. Ricardo”), and plaintiff’s subsequent treatment records.

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.”]).

A. Copies of plaintiff’s personal tax returns for 2018 and 2019

Plaintiff argues that it is impossible for him to provide his personal tax returns for the 2018 fiscal year because he was granted an extension of time to file his personal taxes for 2018. Plaintiff also states that because his personal tax returns for 2019 are not required to be completed until March of 2020, it is impossible for him to procure and produce his personal tax returns for 2019.

Accordingly, plaintiff is directed to advise defendants as to when the extension to file his personal tax returns for 2018 will expire within 30 days of this order. Plaintiff shall thereafter provide copies of his personal tax returns for 2018 and 2019 within 30 days of the date of their respective filings via certified mail.

B. Corresponding statements/schedules for plaintiff’s personal tax returns for 2012-2018

Plaintiff argues that he has provided his personal and business tax returns for the years 2007-2013 in a correspondence dated September 15, 2016, and his business tax returns for 2012-2015 on or about May 17, 2017. Plaintiff also states that he has provided the remainder of his personal tax returns for 2013-2017 as to income on May 29, 2019. Plaintiff further notes that he has supplemented these responses by sending the complete schedule and statements via email with a secured link attached for each of his personal and business tax returns for 2013-2017 to defendants on June 27, 2019. Defendants acknowledge receipt of the same on June 27, 2019, but NYPH has yet to receive this disclosure.

Accordingly, plaintiff is directed to provide NYPH with the above-requested information, or a courtesy copy of the same (either by a hard copy via certified mail, or via email with the secured link attached) within 30 days of this order.

C. Plaintiff's business tax returns for 2018

Plaintiff argues that because these items do not exist, it is impossible for him to obtain or provide the same. To the extent that plaintiff has been granted an extension of time in which to file his business tax returns for 2018, plaintiff is directed to advise defendants as to when the extension to file his business tax returns for 2018 will expire within 30 days of this order. Plaintiff shall thereafter provide copies of his business tax returns for 2018 within 30 days of the date its filing via certified mail.

However, to the extent that such information does not exist, and/or plaintiff did not/will not file his business tax returns for the 2018 fiscal year, plaintiff is directed to provide an affidavit detailing the same within 30 days of this order via certified mail.

D. Corresponding statements/schedules plaintiff's business tax returns for 2012-2018

Plaintiff argues that he has provided defendants with his 2012 business tax returns on or about May 17, 2017, and his business tax returns from 2013-2017 complete with schedules and statements on June 27, 2019. Defendants acknowledge receipt of plaintiff's business tax returns from 2012 to 2019 on June 27, 2019, however, NYPH has not received the same.

Accordingly, plaintiff is directed to provide NYPH with the above-requested information, or a courtesy copy of the same within 30 days of this order via certified mail.

E. Authorizations for plaintiff's subsequent hip treatment and treatment in Mexico

Plaintiff argues that he has provided an authorization to obtain his treatment records from Dr. Fox on July 18, 2017, Dr. Lane on May 9, 2016, and Hyperbaric Medicine and Wound Healing Center on May 9, 2016, March 28, 2019, and June 3, 2019. Plaintiff also states that he has provided an authorization for Dr. Ricardo in his initial response to the preliminary conference order dated March 18, 2016, and again on May 9, 2016. Plaintiff further notes that he has provided subsequent authorizations to obtain records from these providers on June 3, 2019. However, defendants indicate that plaintiff has sent these authorizations to the incorrect law firm.

Accordingly, plaintiff is directed to provide authorizations for plaintiff's subsequent hip treatment as well as appropriate authorizations for plaintiff's treatment in Mexico within 30 days of this order via certified mail. All authorizations shall be mailed to the appropriate law firms in this matter.

F. Authorizations for pharmacies

Plaintiff argues that he has sent defendants and NYPH a correspondence dated April 3, 2018 stating that plaintiff could not recall the pharmacies that he received treatment from other than the one he previously provided. Plaintiff also asserts that defendants and NYPH did not demand authorizations to obtain records from any additional pharmacies.

Accordingly, plaintiff is directed to provide authorizations for plaintiff's pharmacies in which he received treatment within 30 days of this order via certified mail. To the extent that plaintiff has failed to delineate the pharmacies in which he received treatment, defendants and NYPH are directed to send plaintiff a letter identifying any additional pharmacies that they have a sufficient basis to believe that plaintiff has received treatment from within 14 days of this order. Plaintiff shall provide a response to defendants and NYPH's respective letters, if any, within 30 days thereafter.

G. Copies of records from plaintiff's treatment in Mexico or an affidavit stating plaintiff's efforts to obtain his treatment records in Mexico

Plaintiff argues that he is not in possession of any treatment records from Mexico. However, plaintiff advises that in June of 2019, plaintiff came into possession of radiological studies from his treatment in Mexico, which were provided to defendants and NYPH on June 10, 2019.

Accordingly, plaintiff is directed to provide copies of his treatment records from Mexico within 45 days of this order. To the extent that plaintiff is not in possession of his treatment records from Mexico, plaintiff is directed to provide an affidavit to that effect within 30 days of this order, including his efforts to obtain the same. Plaintiff's failure to comply with the above will result in plaintiff's preclusion from offering evidence at the time of trial, and/or the dismissal of plaintiff's complaint.

H. Copies of life insurance policies from 2007-present

Plaintiff argues that defendants and NYPH's demand for plaintiff's life insurance policies is unclear, ambiguous, unduly burdensome, and unreasonable. Plaintiff also argues that he is "under no circumstances a beneficiary of any life insurance policy held in his name, nor is he receiving any income from any other source other than his employment at Life-Spring Financial."

Plaintiff's objection to providing copies of plaintiff's life insurance policies from 2007-present based on the ambiguity and burdensome nature of such request is unavailing especially in light of the multiple so-ordered stipulations in which plaintiff has agreed to provide his life insurance policies (*see e.g.*, so-ordered stipulations dated May 18, 2017, February 5, 2019, and March 26, 2019).

Accordingly, plaintiff is directed to provide copies of his life insurance policies from 2007-present within 30 days of this order via certified mail. To the extent that plaintiff does not have any life insurance policies, and/or is not a beneficiary of any life insurance policies, plaintiff is directed to provide an affidavit stating the same within 30 days of this order via certified mail. Plaintiff's failure to comply with the above **will** result in plaintiff's preclusion from offering evidence at the time of trial, and/or the dismissal of plaintiff's complaint.

I. Copies of employment/personnel records

As plaintiff has advised that he is self-employed through Life-Spring Financial, and does not have any employment or personnel records, plaintiff is directed to provide an affidavit to that effect within 30 days of this order via certified mail.

J. Supplemental/proper bills of particulars

Plaintiff argues that there have not been any orders since January 19, 2017, or any subsequent discovery demands for supplemental/proper bills of particulars. As such, plaintiff posits that he is under no obligation to provide the same. However, defendants note that the court's May 18, 2017 order specifically directed plaintiff to provide bills of particulars delineating the specific acts of negligence as to each individual defendant.

Accordingly, plaintiff is directed to provide separate bills of particulars with specific allegations as to each individual defendant within 30 days of this order via certified mail. Plaintiff's failure to comply with the above **will** result in plaintiff's preclusion from offering evidence at the time of trial, and/or the dismissal of plaintiff's complaint.

K. Copies of plaintiff's collateral source records

Although plaintiff argues that he has provided authorizations for his collateral source records on January 27, 2016, May 9, 2016 and May 10, 2017, defendants note that plaintiff has

not provided actual copies of his collateral source records. Accordingly, plaintiff is directed to provide a *copy* of his collateral source records within 30 days of this order via certified mail.

L. Updated authorizations for plaintiff's current treatment

While plaintiff argues that he has provided all collateral source records that he is aware that he has received treatment from on January 27, 2016, May 9, 2016, and March 11, 2019, plaintiff shall provide authorizations for all *current treating providers* within 30 days of this order via certified mail.

Due to the lengthy delay of this matter, and plaintiff's gross history of non-compliance with discovery, plaintiff is further directed to submit proof at the next court conference of his compliance with this court's order, including proof that he properly mailed the above-indicated items in compliance with the court's directives herein.

Consequently, it is hereby

ORDERED that DEBORAH A. CLARK LORICH, as preliminary executor of the estate of DEAN G. LORICH, M.D. ("Dr. Lorich") BENJAMIN RICCIARDI, M.D., VENU NEMANI, M.D., and HOSPITAL FOR SPECIAL SURGERY's application to dismiss the complaint is DENIED; and it is further

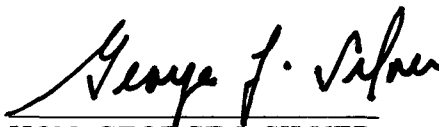
ORDERED that NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER's application to dismiss the complaint is DENIED; and it is further

ORDERED that plaintiff is directed to comply with the court's directives as outlined above; and it is further

ORDERED that the parties are directed to appear for a compliance conference on February 4, 2020 at 111 Centre Street (Part 10, Room 1227), New York, NY 10013, to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: December 17, 2019


HON. GEORGE J. SILVER
GEORGE J. SILVER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION