

<b>Savage v Kredentser</b>
2019 NY Slip Op 34050(U)
October 2, 2019
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Christina L. Ryba
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

ESTATE OF JOYCE SAVAGE, HOWARD  
ALVIN SAVAGE, Individually and as the Estate  
Representative,

Plaintiffs,

-against-

DECISION/ORDER  
Index No. 900156-2015  
RJI No. 01-15-17128

DR. DANIEL C. KREDENTSER, WOMEN'S  
CANCER CARE ASSOCIATES LLC. ST. PETER'S  
HOSPITAL CENTER OF THE CITY OF ALBANY,  
INC., ST. PETER'S NURSING AND REHABILITATION  
CENTER INC., and JOHN DOES 1 THOUGH 50,  
Defendants.

APPEARANCES:

Savage Law PLLC  
For Plaintiffs  
705 Greene Street  
Beauford, South Carolina 29902

Maguire Cardona, P.C.  
For Defendants St. Peter's Hospital Center and  
St. Peter's Nursing and Rehabilitation Center Inc.  
22 Clinton Avenue  
Albany, New York 12207

Thorn Gershon Tymann & Bonanni LLP  
For Defendants Dr. Daniel C. Kredentser and  
Women's Care Associates LLC.  
5 Wembley Court, P.O.B. 15054  
Albany, New York 12212

RYBA J.,

As discussed in detail in the prior decisions rendered by this Court, the procedural history of this protracted medical malpractice litigation includes over two dozen motions, several of which have been found to be frivolously filed by plaintiffs' counsel resulting in the imposition of sanctions upon her. Soon after the Court issued its decision imposing sanctions upon plaintiffs' counsel for frivolous conduct, plaintiffs filed two additional motions. Both motions, one seeking a stay of the trial which is scheduled to commence on October 21, 2019 and the other seeking permission to serve a second amended complaint, were denied by decision and order dated September 9, 2019. While

those motions were still pending, plaintiffs filed yet another motion, this time seeking to strike the answers of the respective defendants pursuant to CPLR 3124 and 3126 due to their alleged failure to respond to outstanding requests for disclosure of insurance information and certain communications between defense counsel. Defendants St. Peter's Hospital of Albany and St. Peter's Nursing and Rehabilitation Center Inc. (hereinafter the St. Peter's defendants) and defendants Women's Cancer Care Associates LLC and Daniel C. Kredentser (hereinafter the Kredentser defendants) have filed separate cross motions seeking the impositions of costs and sanctions against plaintiffs' counsel for frivolous motion practice pursuant to 22 NYCRR 130-1.1 (C) (3). Plaintiffs oppose the cross motions and also make an informal request for costs and sanctions against defendants.

A motion to strike a pleading due to the failure to comply with discovery must be supported by evidence that a party has "refuse[d] to obey an order for disclosure or willfully fail[ed] to disclose information which the court finds ought to have been disclosed" (Kim v A. Johnson Plumbing & Heating, 148 AD3d 1312, 1313 [2017]; see, Green Tree Serv., LLC v Bormann, 157 AD3d 1112, 1113 [2018]). Because dismissal of a pleading for noncompliance with discovery is a drastic remedy, a motion to strike a pleading must be supported by "a clear showing of willful or contumacious conduct" (Kim v A. Johnson Plumbing & Heating, 148 AD3d 1312, 1313 [2017], quoting Kinge v State of New York, 302 AD2d 667, 669 [2003]; see, Mary Imogene Basset Hosp. v Cannon Design Inc., 84 AD3d 1543, 1544 [2011]). Here, a review of plaintiffs' submissions reveals that the basis for the motion to strike the respective answers of the St. Peter's defendants and the Kredentser defendants is their alleged failure to disclose certain information requested by plaintiffs' counsel in various emails to respective defense counsel. Said email requests were made more than one year after plaintiffs filed the Note of Issue certifying that discovery was complete and

the case was ready for trial. Noticeably absent from plaintiffs' moving papers is any evidence that properly served discovery demand is outstanding. Although plaintiffs repeatedly reference prior discovery disputes which resulted in the imposition of sanctions against the respective defendants for failure to comply with disclosure, those discovery disputes are now resolved and have no bearing on the resolution of the present controversy. Finally, plaintiffs have failed to make any showing they engaged in a good faith effort to resolve the present dispute prior to resorting to motion practice as required by the applicable Court Rules. Under these circumstances, plaintiffs' motion to strike the answers of the respective defendants is denied.

The Court will next address the respective cross motions for costs and sanctions filed by the Kredentser defendants and the St. Peter's defendants. Under 22 NYCRR part 130, the Court has discretion to impose sanctions upon any party or attorneys for frivolous conduct which is defined as conduct that (1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to harass, delay or prolong the resolution of the litigation; or (3) asserts false statements of material fact (22 NYCRR 130-1.1[c][1]). In deciding whether the conduct at issue is frivolous, the Court must consider various factors including the circumstances under which the conduct took place and whether or not the conduct continued when its lack of legal or factual basis should have been apparent (see, Navin v Mosquera, 30 AD3d 883, 884 [2006]; First Deposit Natl Bank v Van Allen, 277 AD2d 858, 860 [2000]).

Plaintiffs' motion to strike the answers of the respective defendants is without legal basis, was made on the eve of trial well after the Note of Issue was filed, and was not preceded by the necessary good faith attempt to resolve the dispute. Accordingly, the Court finds that plaintiffs' motion was frivolous. In its decision and order dated April 16, 2019, this Court previously

sanctioned plaintiffs' counsel for frivolous conduct, finding that she engaged in a "distinct pattern of conduct aimed at delaying this already protracted litigation with unnecessary motion practice", and "persisted in creating needless litigation, which in turn has caused unnecessary costs to defendants and unreasonable delays to the resolution of this action \* \* \* despite being given notice that it was causing needless delay." The Court further found that, given "the length of time that this pattern of conduct has detracted from the attention that the merits of this action deserves, the gravity of the accusations that plaintiffs' counsel has frivolously aimed at defendants and their counsel, and her apparent inattention to prior complaints of undue delay and expense", an award of sanctions to the Kredentser defendants and the St. Peter's defendants in the amount of \$2,500 each was appropriate. Significantly, the Court cautioned plaintiffs' counsel "that any future application for relief will of course be subject to a potential motion for sanctions in the event that the application is frivolous."

Here, despite the Court's previous warnings, plaintiffs' counsel has continued to create needless litigation and expense with the filing of another frivolous motion that is clearly aimed at delaying the imminent trial. Considering the circumstances and history of this litigation and that the previous award of sanctions failed to deter plaintiffs from engaging in baseless motion practice, the Court in its discretion determines that an award of sanctions against plaintiffs' counsel in favor of the Kredentser defendants and the St. Peter's defendants in the amount of \$3,000 each is appropriate (see, Flanigan v Smyth, 148 AD3d 1249, 1253-54 [2017], leave to appeal dismissed in part, denied in part, 29 NY3d 1046 [2017]; Heilbut v Heilbut, 18 AD3d 1, 3 [2005]). Such amounts shall be paid by plaintiffs' counsel within 30 days from the date of this decision. Any request for further costs and expenses is denied at this time. Finally, plaintiffs' informal request for an award of sanctions against defendants is denied.

For the foregoing reasons, it is

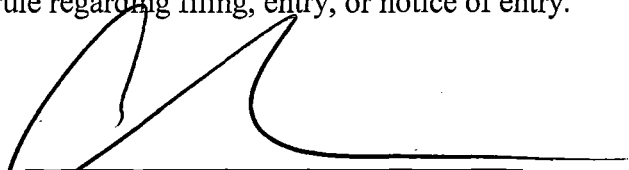
ORDERED that plaintiffs' motion is denied, without costs, and it is further

ORDERED that the motion by the Kredentser defendants to sanction counsel is granted, to the extent that plaintiffs' counsel Denise Savage Esq. is sanctioned in the amount of \$3,000 and directed to pay said amount to the law firm of Thorn, Gershon, Tymann and Bonanni, LLP within 30 days from the date of this decision, and the motion is otherwise denied, and it is further

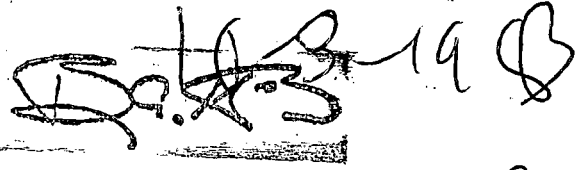
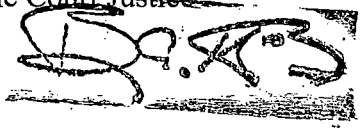
ORDERED that the motion by the St. Peter's defendants to sanction counsel is granted to the extent that plaintiffs' counsel Denise L. Savage Esq. is sanctioned in the amount of \$3,000 and is directed to pay said amount to the law firm of Maguire Cardona, PC within 30 days from the date of this decision, and the motion is otherwise denied, and it is further

This shall constitute the Decision and Order of the Court. The original Decision and Order is being returned to the counsel for the St. Peter's defendants who is directed to enter this Decision and Order and to serve all other parties with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of this Decision and Order and the papers considered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

Dated: October 2, 2019



HON. CHRISTINA L. RYBA  
Supreme Court Justice



108-1983