

Liparulo v New York City Health & Hosp. Corp.

2019 NY Slip Op 34057(U)

July 1, 2019

Supreme Court, Bronx County

Docket Number: 22539/2015E

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY

PRESENT: GEORGE J. SILVER PART 19A

Justice

CARMINE LIPARULO and MARIA LIPARULO,

Plaintiffs,

Index No. 22539/2015E

Motion Seq. No. 001

- v -

DECISION & ORDER

NEW YORK CITY HEALTH AND HOSPITAL CORPORATION and LINCOLN MEDICAL AND MENTAL HEALTH CENTER a/k/a LINCOLN HOSPITAL,

Defendants.

Cross-Motion: Yes No

Defendants NEW YORK CITY HEALTH AND HOSPITAL CORPORATION (“NYCHHC”) and LINCOLN MEDICAL AND MENTAL HEALTH CENTER a/k/a LINCOLN HOSPITAL (collectively “defendants”), move to dismiss this action, pursuant to CPLR § 3126(3). Plaintiffs CARMINE LIPARULO (“plaintiff”) and MARIA LIPARULO (collectively “plaintiffs”) do not oppose the motion. For the reasons discussed below, the court grants the motion.

BACKGROUND

This action was commenced with the filing of plaintiffs’ summons and complaint on May 6, 2015. On September 11, 2015, issue was joined by service of a verified answer on behalf of NYCHHC. Plaintiffs allege that defendants failed to properly reduce plaintiff’s left elbow dislocation, and improperly administered occupational therapy, causing the re-dislocation of plaintiff’s elbow between February 6, 2014 through February 22, 2014.

On June 5, 2018, a preliminary conference was held. Per the preliminary conference order that followed, plaintiffs were to provide authorizations for, *inter alia*, plaintiff’s psychological care records, pharmacy records, and collateral source records. Plaintiffs were also directed to appear for depositions on or before August 21, 2018. However, plaintiffs did not comply with the June 5, 2018 order.

On September 24, 2018, a compliance conference was held. Per the compliance conference order that followed, plaintiffs were directed to provide outstanding authorizations, and to appear for depositions on or before December 11, 2018. Defendants contend that although plaintiffs did not provide the authorizations, defendants nonetheless planned to proceed with the depositions. However, on December 10, 2018, defendants were unable to confirm the depositions as plaintiffs' counsel's telephone and fax numbers were not working. The depositions did not go forward.

On December 17, 2018, a status conference was held. Per the status conference order that followed, plaintiffs were directed to provide authorizations, and to appear for depositions on March 12, 2019 and March 13, 2019. This order also directed that the parties were not to adjourn the depositions without court approval.

On January 14, 2019 and January 23, 2019, defendants sent good faith letters to plaintiffs' counsel, outlining all outstanding authorizations, and requesting that plaintiffs designate a witness for NYCHHC's deposition. The letters also reminded plaintiffs to appear for depositions on March 12, 2019 and March 13, 2019, and included additional dates in which to conduct the depositions. Defendants further requested that plaintiffs respond to their January 23, 2019 letter, and select deposition dates by February 6, 2019. However, plaintiffs did not respond to either letter.

On February 6, 2019, defendants electronically filed another good faith letter on NYSCEF, reiterating plaintiffs' obligation to comply with outstanding discovery. The letter also provided plaintiffs with additional dates in which to conduct the depositions before the March deadline.

On February 11, 2019, defendants received a telephone call from plaintiffs' counsel, who assured defendants that he would provide outstanding authorizations, and confirm dates for plaintiffs' depositions in the near future. Plaintiffs' counsel also expressed interest in designating an occupational therapist for NYCHHC's deposition, but requested that defendants provide his/her name. However, defendants asserted that the names of all of plaintiff's providers can be found in plaintiff's medical records, and that plaintiff needed to provide the name of that individual.

Following a telephone call with plaintiffs' counsel on February 11, 2019, defendants sent plaintiffs' counsel a letter reiterating the need for plaintiffs to comply with outstanding discovery. The following day, plaintiffs' counsel advised defendants that plaintiffs may file a supplemental and/or amended bill of particulars, and requested courtesy copies of defendants' January 14, 2019 discovery demands. On February 19, 2019, defendants sent a letter to plaintiffs' counsel requesting a confirmation date for the depositions, and included courtesy copies of their various demands.

On March 6, 2019, defendants sent a final good faith letter to plaintiffs' counsel requesting a confirmation of the March 12, 2019 and March 13, 2019 depositions. Plaintiffs did not respond to this letter. Defendants were also unable to reach plaintiffs' counsel as his telephone and facsimile lines were disconnected. On March 11, 2019, defendants again attempted to confirm the depositions, however, plaintiffs' counsel's number was still disconnected.

Although defendants' counsel was unable to contact plaintiffs' counsel, he assumed that the depositions would go forward, and appeared at plaintiffs' counsel's office on March 12, 2019 with a court reporter. However, neither plaintiffs' attorney nor plaintiffs were present. Defendants' counsel attempted to call plaintiffs' counsel, but his telephone number was still disconnected. Defendants' counsel waited until 10:30 a.m. before leaving. The depositions did not go forward.

Defendants argue that plaintiffs' willful, deliberate, and contumacious conduct warrants dismissal of the action. Defendants contend that plaintiffs have repeatedly neglected to comply with court orders, despite defendants' numerous good faith efforts, by failing to provide authorizations, designate a witness on behalf of NYCHHC, and appear for depositions. Defendants also note that plaintiffs' failure to appear for depositions is particularly egregious as the court's December 17, 2018 order directed that there shall be no adjournments of depositions without court approval. Ultimately, defendants aver that plaintiffs' repeated delays have prejudiced their ability to defend this action as several years have passed since the alleged malpractice.

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.”]).

Here, plaintiffs have failed to provide discovery despite multiple court orders and defendants’ good faith attempts to obtain discovery, including numerous good faith letters. Plaintiffs’ blasé attitude towards the discovery process and willful disregard of prior court orders is further aggravated by plaintiffs’ failure to submit opposition to defendants’ instant application to dismiss the complaint, and failure to appear for two scheduled conferences before the court on April 3, 2019 and April 24, 2019 (*Excise Bond Underwriters v. Zurich Am. Ins. Co.*, 103 A.D.3d 560, 561 [1st Dept. 2013]; *Ranfort v. Peak Tours, Inc.*, 250 A.D.2d 747, 747 [2d Dept. 1998]). Accordingly, based on plaintiffs’ gross history of non-compliance with both discovery demands and several prior court orders, this action is hereby dismissed.

Consequently, it is hereby

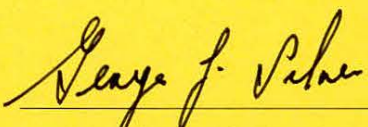
ORDERED that plaintiffs’ complaint is dismissed in its entirety; and it is further

ORDERED that defendants are directed to serve a copy of this order upon plaintiffs with notice of entry within 30 days of this order; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon plaintiff, the clerk is directed to enter judgment dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: July 1, 2019


 HON. GEORGE J. SILVER
 GEORGE J. SILVER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION