

Draper v Pasquale

2019 NY Slip Op 34264(U)

April 12, 2019

Supreme Court, Westchester County

Docket Number: Index No. 70018/2017

Judge: Joan B. Lefkowitz

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.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
SHEENA DRAPER, as the ADMINISTRATRIX of
the ESTATE of AUDREY E. SCOTT, deceased,

Plaintiff,

DECISION & ORDER

-against-

Index No. 70018/2017
Motion Date: February 4, 2019

SALAVATORE PASQUALE, M.D., JILL S. WALDMAN,
M.D., SKY VIEW REHABILITATION & HEALTH
CARE CENTER LLC, NORTHWELL HEALTH, INC.
d/b/a PHELPS HOSPITAL NORTHWELL HEALTH,

Seq. Nos. 1, 2, 3

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on motion sequence numbers 1, 2 and 3 by defendants for an order: (1) dismissing the complaint; or (2) precluding plaintiff from offering any evidence at the time of trial as to issues of liability for her failure to comply with multiple orders of the court concerning discovery, or, alternatively; (3) compelling plaintiff to comply with the court orders concerning discovery; (4) awarding costs and sanctions; and (5) for such other and further relief as this court may deem just, proper and equitable.

Seq No. 1
Order to Show Cause, Affirmation, Affirmation of Good Faith, Exhibits A-U
Affirmation in Opposition
Supplemental Affirmation
NYSCEF Record

Seq. No. 2
Order to Show Cause, Affirmation in Support, Exhibits A-J
Affirmation in Opposition
Supplemental Affirmation
NYSCEF Record

Seq. No. 3
Order to Show Cause, Affirmation in Support, Exhibits A-H
Affirmation in Opposition
Supplemental Affirmation
NYSCEF Record

Upon the foregoing papers and the proceedings on January 14, 2019 and February 4, 2019, these motions are decided as follows:

Plaintiff commenced the present action by the filing of a summons and verified complaint on December 6, 2017. The parties executed a Preliminary Conference Stipulation which was so-ordered on June 7, 2018. Thereafter, conferences were held and Compliance Conference Orders were entered on October 16, 2018, November 7, 2018 directing plaintiff to provide discovery. Defendants now bring the present motions seeking to dismiss the complaint on the grounds that plaintiff has failed to comply with this Court's orders directing plaintiff to provide discovery. Oral argument was heard on January 14, 2019 and February 4, 2019. At the February 4, 2019 oral argument, plaintiff handed defense counsel additional discovery responses and defendants represented to the Court that such were deficient and discovery remained outstanding.

Defendant Salvatore Pasquale, M.D. (Pasquale") complains that plaintiff has not provided a proper or verified Bill of Particulars. For example, in his motion papers, Pasquale points out that the Bill of Particulars is identical to the co-defendants and refers to dental procedures when Pasquale is not a dentist. Pasquale further states that plaintiff has only provided a "handful" of authorizations which do not include the primary care physician or medical examiner. Further plaintiff has not provided employment records or photographs.

Defendants Jill S. Waldman, M.D. and Northwell Health Inc d/b/a Phelps Hospital Northwell Health (collectively, Northwell) echoes Pasquale's arguments and adds that plaintiff has failed to provide authorizations for IRS records and home care attendants.

Similarly, defendant, Sky View Rehabilitation and Health Care Center LLC d/b/a Sky View Rehabilitation & Health Care ("Skyview") is owed the same discovery, including a proper and responsive Verified Bill of Particulars as well as proper HIPPA compliant authorizations for primary care, radiological studies, occupational therapy, dieticians, EMS, home care/attendant, and the medical examiner file and employment records and photographs.

The NYSCEF record reflects that subsequent to the filing of these motions, on February 6, 2019, plaintiff's counsel moved to withdraw as attorney for plaintiff. Thereafter, a consent to change attorney was filed on March 21, 2019 substituting new counsel. However, there is no indication on NYSCEF that plaintiff has cured her default in providing discovery since that date.

CPLR 3126 provides that if a party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Arpino*, 102 AD3d at 210; *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated

noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]; *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Plaintiff has offered no excuse for her failure to comply with its discovery obligations and its failure to comply with three court orders directing her to provide responses to defendants' discovery demands. In light of the foregoing, an order of dismissal would be warranted. However, plaintiff will be given one more opportunity to provide the responses as directed herein. Should plaintiff fail to so comply, defendants shall submit an affirmation of noncompliance with a proposed order dismissing the complaint as set forth herein. Defendants are also entitled to \$500.00 each for costs associated with bringing these motions.

Accordingly, it is:

ORDERED that defendants' motions (sequence numbers 1, 2 and 3) are granted to the extent that plaintiff's complaint shall be dismissed unless on or before April 22, 2019, plaintiff serves complete responses to defendants' discovery demands and proper Bills of Particulars; and it is further

ORDERED that plaintiff shall make a monetary payment to each movant, on or before April 22, 2019, in the amount of \$500.00 for costs associated with bringing their motions, and file proof of payment on NYSCEF on or before that date; and it is further


ORDERED that in the event that plaintiff fails to comply on or before April 22, 2019 with any provision hereof, any aggrieved defendant shall file an affidavit of non-compliance and a proposed Order dismissing plaintiff's complaint on or before April 26, 2019; and it is further

ORDERED that in the event plaintiff fully complies with this Order, all counsel shall appear for a conference in the Compliance Part, Courtroom 800, on May 6, 2019, at 9:30 A.M.

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties within 10 days of entry.

This constitutes the Decision and Order of this court.

Dated: White Plains, New York
April 17, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel by NYSCEF
cc: Compliance Part Clerk