

Harris v Sun Jin Kim
2020 NY Slip Op 31035(U)
March 16, 2020
Supreme Court, Bronx County
Docket Number: 23243/2015E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY

PRESENT: GEORGE J. SILVER

Justice

JOCELYN HARRIS,

Index No. 23243/2015E

Motion Seq. No. 005

Plaintiff,

- v -

DECISION & ORDER

SUN JIN KIM, M.D., MONTEFIORE MEDICAL CENTER, ZIMMER BIOMET, and JOHN DOE MANUFACTURING COMPANY,

Defendants.

Cross-Motion: Yes No

Defendant ZIMMER BIOMET (“defendant” or “Zimmer”) moves for an order, pursuant to CPLR § 3126, dismissing plaintiff JOCELYN HARRIS’ (“plaintiff”) complaint for plaintiff’s failure to comply with court-ordered discovery and subsequent discovery demands. In the alternative, defendant seeks an order, pursuant to CPLR § 3124, compelling plaintiff to comply with all outstanding discovery demands or “face immediate dismissal.” Plaintiff opposes the motion. For the reasons discussed below, the court grants the motion in part.¹

BACKGROUND AND ARGUMENTS

This action was commenced with the filing of plaintiff’s summons and complaint on June 6, 2015 against Dr. Kim and Montefiore. On November 10, 2015, plaintiff filed a separate lawsuit against Zimmer with allegations of products liability. Pursuant to an order dated October 25, 2016, both cases were consolidated. Plaintiff alleges that she suffered personal injuries as a result of Dr. Kim’s implantation of a Zimmer hip replacement device (“hip device”) into plaintiff’s right hip on November 13, 2012.

¹ Plaintiff has filed a partial stipulation of discontinuance against Zimmer on September 6, 2019. As the stipulation has not been signed by all parties, namely, SUN JIN KIM, M.D. (“Dr. Kim”) and MONTEFIORE MEDICAL CENTER (“Montefiore”), the court declines to so-order the stipulation absent a motion by Zimmer. As such, pending the so-ordering of the stipulation of discontinuance, the court will decide this motion on its merits.

Defendant asserts that it has made multiple requests to plaintiff to produce information supporting her claims that the Zimmer hip device “had previously been recalled,” and that “[a]s a result of defective components installed, plaintiff suffered a variety of injuries.” Specifically, defendant highlights that it has sent numerous letters to plaintiff requesting the above information, including letters dated March 9, 2018, May 4, 2018, May 22, 2018, and August 9, 2018. Defendant also points out that as a result of plaintiff’s failure to provide said information, the court ordered plaintiff on August 14, 2018 to produce information and documents supporting her claims of a product-recall and the need for a revision surgery by September 3, 2018. However, plaintiff failed to comply.

Additionally, defendant argues that contrary to plaintiff’s assertions, it has confirmed that plaintiff’s hip device was not recalled, and that plaintiff’s medical records to date indicate that plaintiff’s hip device is implanted, and functioning appropriately in plaintiff’s right hip as of today. Defendant notes that plaintiff’s medical records do not show that the hip device has failed in any way, or that plaintiff has undergone or will need to undergo a future revision surgery due to a complication or issue with her hip device.

In opposition, plaintiff argues that on August 30, 2018, the Appellate Division, First Department, suspended plaintiff’s prior attorney from practice, which automatically stayed this action. Plaintiff also advises that on December 18, 2018, a formal order was issued to stay the matter, but that order has not been served on plaintiff.²

Moreover, plaintiff argues that contrary to defendant’s assertion that plaintiff did not provide the requested information, said information is within defendant’s possession. Plaintiff also posits that a Google search reveals that there was a Zimmer hip replacement recall in 2012, where “the issue was defective metal Durom Cup hip implants,” and a 2014 Zimmer hip replacement recall. Plaintiff further avers that she has provided authorizations to obtain her medical records relevant to the subject claim, but to the extent that defendant seek new authorizations, she is willing to provide the same.

In reply, defendant argues that plaintiff was not implanted with a Durom Cup device, and that none of the components for the specific hip device that plaintiff received have been recalled based on a search of the product and lot number for the components of plaintiff’s hip device on

² This issue is moot as plaintiff has retained new counsel following the court’s June 5, 2019 order permitting plaintiff’s former counsel to withdraw as attorney of record for plaintiff.

the Food & Drug Administration medical device recall database. Defendant also contends that plaintiff did not attach or produce the results of her purported Google search or any medical records supporting her claim that she has undergone or will undergo a future revision surgery to remove and replace her hip device due to a complication or issue with the device. Rather, defendant reiterates that plaintiff's medical records to date indicate that plaintiff's hip device remains implanted, and is functioning appropriately as intended.

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, plaintiff has failed to provide discovery despite a prior court order, and defendant’s numerous follow-up requests for the same items of discovery. Plaintiff’s blasé attitude towards the discovery process and willful disregard of a prior court order is further aggravated by plaintiff’s brief and haphazard opposition to defendant’s motion, wherein plaintiff failed to offer any

explanation for her failure to comply with the court's July 24, 2019 order (*id.*). Moreover, plaintiff's opposition vaguely references a Google search, but fails to provide any evidence as to the results of her search, or its relevance to her hip device at issue. Plaintiff further fails to provide any medical records to support her claim that her hip device was recalled, or that she has undergone or will need to undergo a future revision surgery related to her Zimmer hip device.

Accordingly, based on the foregoing, plaintiff is directed to provide an affidavit as to the recall of the Zimmer hip replacement device at issue as well as any evidence of plaintiff's revision surgery within 30 days of this order. Plaintiff's failure to provide the same WILL result in plaintiff's preclusion from offering evidence of damages at the time of trial.

Plaintiff is also directed to provide any outstanding authorizations for medical records relevant to the subject claim within 30 days of this order.

Consequently, it is hereby

ORDERED that defendant's application to dismiss the complaint is DENIED; and it is further

ORDERED that defendant's application to compel plaintiff to provide outstanding discovery is GRANTED to the extent indicated above; and it is further

ORDERED that defendant's application to compel plaintiff to pay the costs and attorneys' fees associated with this motion is DENIED; and it is further

ORDERED that the parties are directed to appear for a compliance conference on June 17, 2020 at 851 Grand Concourse, Room 600 (Part 19A), Bronx, New York 10451, to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: March 16, 2020


HON. GEORGE J. SILVER

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION