

<b>Eze v New York City Health &amp; Hosps. Corp.</b>
2020 NY Slip Op 31494(U)
May 18, 2020
Supreme Court, New York County
Docket Number: 450376/2017
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 10**

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**CHIDI EZE as Proposed Administrator of the  
Estate of ANDERSON OBODOHUO EZE, a/k/a  
NIGEL POWELL, deceased and CHIDI EZE,  
Individually,**

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-against-

**Hon. GEORGE J. SILVER**

**NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION**

Justice Supreme Court

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The following papers numbered 1 to 2 were read on this motion for (Seq. No. 003)  
for **DISMISSAL** Noticed on **September 26, 2019.**

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s).

**HON. GEORGE J. SILVER:**

Upon a reading of the foregoing cited papers it is ordered that defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION's ("defendant") motion to strike plaintiffs' complaint for failure to provide discovery and file a certificate of merit, is granted. As such, the complaint is dismissed.

Defendants made prior applications to strike the complaint for plaintiffs' failure to provide discovery. Most recently, on June 4, 2019, this court issued an order that afforded plaintiff one more opportunity to supplement its discovery responses appropriately or face potential dismissal of the complaint. The courts action represented, once again, an opportunity for plaintiffs to provide the demanded discovery and to comply with the court's directives. Plaintiffs failed to comply appropriately. Indeed, on July 3, 2019 plaintiffs served a second Supplemental Bill of Particulars that was nearly identical in substance and form to the Bill of Particulars dated September 19, 2018 and the first supplemental Bill of Particulars dated November 23, 2018. The second supplemental Bill of Particulars failed to provide specific dates of the negligence and malpractice and it failed to particularize deviations and departures from the customary standard of care among other deficiencies. On September 9, 2019, defendant objected to plaintiffs' second supplemental Bill of Particulars in a letter to the court that again requested that this matter be dismissed. On September 10, 2019, the parties appeared for a conference in this matter. At the conference, by court order, the parties were directed to move for the relief requested by Order to Show Cause returnable on November 12, 2019.

Despite defendant's efforts over several years to properly investigate plaintiffs' claims, all essential discovery remains outstanding. Without the receipt of any relevant discovery, defendant argues that it is limited and severely prejudiced in attempting to defend this action. To be sure, defendant avers that plaintiffs have continually failed to particularize and substantiate their claims for plaintiff-decedent's physical injury, death and financial losses of greater than \$3,000,000.

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Further, to date, more than three years after the filing of the summons and complaint, a certificate of merit has still not been filed. Plaintiffs failed to provide discovery that plaintiffs have agreed to provide, and that plaintiffs have failed to object to, is beyond the cavil. Moreover, plaintiffs failed to timely oppose this motion, electing to only submit cursory and non-responsive opposition one day prior to the return date. Defendant has tried to confer with plaintiffs' counsel to obtain the demanded discovery. Defendant's attempts to communicate have been unfruitful, and plaintiffs have ignored the court's orders, thereby prompting the making of this motion.

“CPLR §3101(a) allows for the full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” The items demanded by defendant are material and necessary to the defense of this action. CPLR §3124 grants the court the power to compel a party to provide discovery demanded. This court has on more than one occasion ordered plaintiffs to provide the discovery demanded. CPLR §3126 grants the court the power to sanction a party that fails to comply with a court's discovery order. Plaintiffs have failed to comply with multiple discovery orders issued by this court.

Striking a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with a discovery order was wilful, contumacious or due to bad faith. Thus it has been found to be an improvident exercise of the court's discretion to strike a pleading where non-compliance with discovery was due to law office failure (*Mateo v. City of New York*, 274 AD2d 337 [1st Dept. 2000]); where the defendants had already served a response to the discovery demands (*Hoi Wah Lai v. Mack*, 89 AD3d 990, 933 [2d. Dept. 2011]) or where a defendant wilfully participates in discovery (*Prappas v. Papadatos*, 38 AD3d 871, 833 [2d Dept. 2007]).

Extreme conduct is required before the imposition of the ultimate penalty of striking the answer for failure to comply with a discovery order (*Pezhman v. Department of Education of the City of New York*, 95 AD3d 625 [1st Dept. 2012]). Thus an answer will be stricken where a party exhibits a pattern of partial compliance with disclosure demands, complying only after being directed by court order, delaying completion of discovery over a period of years (*United States Fire Insurance Company v. J.R. Greene, Inc.*, 272 AD2d 148 [1st. Dept. 2000]) or where a party fails to respond in a meaningful manner to various court orders and or demands for discovery (*Cavota v. Perini Corporation*, 31 AD3d 362 [2d Dept. 2006]).

Here, plaintiffs' actions in failing to comply with multiple court orders directing that they provide discovery are extreme, deliberate, willful and contumacious warranting the granting of the motion to strike the complaint. To be sure, plaintiffs' willful and contumacious conduct can be inferred by plaintiffs' failure to provide any meaningful discovery. To date, plaintiffs have failed to clarify and particularize the injuries and damages alleged in the Bill of Particulars, despite multiple court orders to do so. A Bill of Particulars is required to amplify the pleadings, limit the proof and scope of the inquiry, prevent surprise at trial, and make known plaintiffs' claims. Furthermore, vague and conclusory statements concerning acts of negligence, injuries, special damages, and loss of services do not meet function of a Bill of Particulars. Rather, since the Bill of Particulars is an intermediate step between the complaint and discovery, it must be sufficiently informative to be of some value in sharpening the issues before proceeding to examinations before trial.

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Plaintiffs' Bill of Particulars dated September 19, 2018, Supplemental Bill of Particulars dated November 23, 2018 and Supplemental Bill of Particulars dated July 3, 2019, all fail insofar as they do not amplify the pleadings, limit the scope of inquiry or make plaintiffs' claims known.

In addition to plaintiffs' failure to meaningfully supplement the Bill of Particulars, plaintiffs have also failed to provide HIPAA-compliant authorizations to allow defendant to properly investigate the damages alleged by plaintiffs in this matter. To date, the only discovery that has been provided consists of the letters of administration, guardianship papers, birth certificates and paternity affidavits, the decedent's death certificate, and funeral bills in the amounts of \$3,500 and \$4,956. In the most recent supplemental Bill of Particulars, plaintiffs provided decedent's social security number and alleged that decedent was employed as a used car salesman, but neglected to otherwise supplement other discovery responses, as directed.

In addition to these deficiencies, plaintiffs have failed to file a certificate of merit. CPLR §3012-a(1) provides that, "in any action for medical malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff declaring that the attorney has consulted with at least one physician." The question of whether the court may dismiss the action violation of CPLR §3012-a, however, is in dispute.

In *Santangelo v. Raskin*, 137 AD2d 74 [2d Dept. 1988], the Appellate Division, Second Department, held that failure to timely serve a certificate of merit pursuant to CPLR 3012-a amounts to a default and upon defendant's motion, warrants dismissal. The court stated that to defeat defendant's motion to dismiss, plaintiff must prove reasonable excuse for the failure and provide a certificate of merit from a physician (*id.*). The Appellate Division, Fourth Department, likewise held in *Prince v. State*, 149 AD2d 963 [4th Dept. 1989], that dismissal was warranted where no reasonable excuse was offered, but clarified that the dismissal would not be "on the merits."

In 1989, the Court of Appeals in *Tewari v. Tsoutsouras*, 75 NY2d 1, 9 (1989), concluded that the court has no power to dismiss an action for failure to timely serve a notice of medical malpractice pursuant to CPLR §3406(a), but can only grant or deny plaintiffs an extension of time to file the notice. The court stated that a trial court may only dismiss a complaint for failure to comply with a court order, not for failures under CPLR §3406(a) (*id.* at 12). Nonetheless, the Court of Appeals did not specifically address the failure to file a certificate of merit pursuant to CPLR §3012-a. (*id.*).

In response to *Tewari*, the Appellate Division, Second Department, reversed itself in *Kolb. v. Strogh*, 158 AD2d 15(2d Dept. 1990), and held that *Tewari* prohibits the dismissal of a complaint for failure to file a certificate of merit under CPLR §3012-a (*see also, Rice v. Vandenbossche*, 185 AD2d 336, 338 [2d Dept 1992]).

That same year, in *Perez v. Lenox Hill Hosp.*, 159 AD2d 251 (1st Dept. 1990), the Appellate Division, First Department, declining to follow *Kolb* and citing *Santangelo*, granted defendants' motion to dismiss because plaintiff failed to timely file a certificate of merit. In doing so, the court stated that failure to comply with CPLR §3012-a is grounds for dismissal unless the plaintiff can demonstrate reasonable excuse for the

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delay or a meritorious cause of action (*id.*). Again, in *George v. St. John's Riverside Hosp.*, 162 AD2d 140 (1st Dept. 1990), the Appellate Division, First Department, cited *Santangelo* and granted defendants' motion to dismiss because plaintiff failed to file a certificate of merit until after defendants moved to dismiss. The court stated that in order to avoid dismissal, the plaintiff needed to show "a reasonable excuse for failure to comply with the statute and an affidavit of merit from a medical expert" (*id.*). In neither case did the court mention *Tewari*.

Based on the Appellate Division, First Department's repeated reliance on *Santangelo*, this court has the power to dismiss the complaint unless plaintiffs demonstrate a reasonable excuse for the delay and provide an affidavit from a medical expert.

Here, plaintiffs' have failed to submit a certificate of merit. Moreover, plaintiffs have failed to proffer a reasonable excuse for their failure to do so, and there is no evidence that plaintiffs' counsel has had, or is contemplating, consultation with a presently licensed medical provider as required by CPLR §3012-a(1). Moreover, there is no exception to providing a certificate of merit merely because plaintiffs have stated their intention to proceed with this lawsuit under a *res ipsa loquitor* theory.

Because plaintiffs have violated CPLR §3012-a by failing to file an appropriate certificate of merit, the only mechanism by which plaintiffs can avoid dismissal is by providing a reasonable excuse for the failure and submitting an affidavit from a physician establishing that the case has merit. Plaintiffs have done neither action.

Therefore, this court must grant defendant's motion to dismiss for plaintiffs' failure to provide court-ordered discovery as well as for plaintiffs' violation of CPLR §3012.

Accordingly, it is hereby

ORDERED that the motion to strike plaintiffs' complaint is granted, and it is further

ORDERED that the complaint is stricken, and it is further

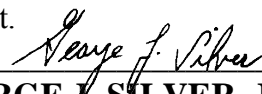
ORDERED that the complaint is dismissed in its entirety, and it is further

ORDERED that the clerk of court enter judgment dismissing all claims and cross-claims asserted in this action.

This constitutes the decision and order of the court.

Dated: May 18, 2020

Hon.



GEORGE J. SILVER, J.S.C.

1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE