

**Madison Physical Therapy P.C. v Care Physical
Therapy P.C.**

2020 NY Slip Op 33399(U)

July 1, 2020

Supreme Court, Kings County

Docket Number: 521803/18

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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MADISON PHYSICAL THERAPY P.C., et al,
Plaintiffs, Decision and order

- against - Index No. 521803/18

CARE PHYSICAL THERAPY P.C., et al,
Defendants, July 1, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3126 seeking to strike the plaintiffs complaint for the failure to provide discovery. The plaintiffs have opposed the motion arguing they have complied with discovery and the motion is moot. Papers have been submitted by all parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint the plaintiff Amir sold his business, a physical therapy practice, to defendant Dinewitz for a price of \$230,000. The payment schedule of the purchase amount required Dinewitz to pay an initial down payment of \$20,000, then \$3,000 a month for sixty months and a final payment of \$30,000 at the end of the sixty month period due September 2018. The Complaint alleges the defendant failed to make any of the sixty payments and likewise did not make the final \$30,000 payment. Further, pursuant to the agreement there was a transitionary period wherein the seller and the purchaser would be working together and dividing the profits accordingly. The first cause of action alleges breach of contract. The second cause of action alleges the

plaintiff seeks reimbursement for "overpayments and expenses" regarding payments the plaintiff made on defendant's behalf. The defendants have asserted counterclaims which essentially contend that in fact they are owed money from the plaintiffs for work performed by Dinewitz which the plaintiffs billed or should have billed to insurance companies or Medicaid. Further, the counterclaims assert the plaintiffs engaged in improper billing practices and failed to pay certain expenses that became chargeable to the defendants. The defendants have moved seeking to strike on the grounds the plaintiffs have failed to comply with discovery sought.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the appropriate sanction for a discovery violation (Espinal v. City of New York, 264 AD2d 806, 695 NYS2d 610 [2d Dept., 1999]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Harris v. City of New York, 211 AD2d 663, 622 NYS2d 289 [2d Dept., 1995]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Birch Hill Farm Inc., v. Reed, 272

AD2d 282, 707 NYS2d 188 [2d Dept., 2000]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a "pattern of wilful default and neglect" concerning the outstanding discovery (Clarke v. United Parcel Service Inc., 300 AD2d 614, 752 NYS2d 395 [2d Dept., 2002]). Thus, each party is required to introduce a reasonable excuse why such discovery has yet been complied with (Birch Hill Farm Inc., supra).

In this case it can hardly be said that the plaintiffs engaged in any wilful or contumacious conduct at all. Therefore, the motion seeking any sanction is denied.

Further, the defendants have served burdensome and excessive interrogatories that far exceed the number that is acceptable in Commercial Cases (see, Rule 11-a of the Rules of the Commercial Division). Therefore, the plaintiffs need not respond to those interrogatories.

Concerning the remaining discovery demands, upon review of the responses already provided the plaintiffs obviously cannot provide information not in their possession. Of course, the plaintiffs are under a continuing obligation to provide relevant and necessary discovery. Concerning the explanation of benefits, the most contentious issue, there can be no obligation upon the plaintiffs where all the information is in the possession of third parties, of which the defendants are aware. The argument that further

information is still necessary because the information from the third party medical providers will not provide a complete picture of services rendered is speculative and can be revisited when all the information is secured from those third parties. Further, there can be no discovery violation if the plaintiffs assert they do not possess the information but the defendants second guess or dispute those assertions. Of course, as noted, plaintiffs are aware of full compliance with relevant discovery sought.


The parties are directed to resolve any further discovery disputes with these guidelines in mind.

The motion is denied to the extent noted.

So ordered.

ENTER:

DATED: July 1, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC