

Iskhakova v Abayev

2020 NY Slip Op 33948(U)

October 8, 2020

Supreme Court, Queens County

Docket Number: 713061/2017

Judge: Peter J. O'Donoghue

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.

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on September 20, 2017 for medical malpractice and lack of informed consent.¹ Plaintiff alleges she suffered personal injuries caused by defendants' negligent administration of an injection. In her bill of particulars, plaintiff alleges that as a consequence of defendants' negligence, she sustained a perforation of her right lung, requiring the insertion of a chest tube and hospitalization, and suffered chest pain, hemothorax, pneumothorax, pleural effusion, tachycardia, shortness of breath, scarring, decreased lung capacity, dizziness, emotional distress, and loss of enjoyment of life. She seeks to recover damages, including special damages.

Defendants served an answer, and by preliminary conference order, dated February 13, 2018 (EF Doc. #97), the court directed, among other things, that plaintiff provide various authorizations, and "[a] supplemental bill of particulars may be served within 30 days of completion of the last party deposition." The PC order also provided that "[p]ursuant to CPLR Rule 3212(a), any motion for summary judgment shall be made no later than 120 days after the filing of the Note of Issue."

On March 20, 2018, defendants moved (mot. Seq. No. 1) to (1) dismiss, pursuant to CPLR 3211 the cause of action based upon negligent hiring/retention and renewal of privileges, (2) strike plaintiff's bill of particulars, pursuant to CPLR 3042(c), on the ground it included overly broad allegations and contained "boilerplate" language and failed to specify particulars with respect to, among other things, the claimed special damages, (3) require, pursuant to CPLR 3042(c), plaintiff to serve a responsive bill of particulars and (4) compel plaintiff, pursuant to CPLR 3101 and 3104 to provide certain disclosure. Prior to the submission of the motion, plaintiff advised defendants by letter dated April 25, 2018, that "a supplemental Bill of Particulars as to [p]laintiff's special damages will be provided pursuant to the CPLR" (EF Doc. #114). By order dated October 3, 2018 (EF Doc. #126), the court granted the branch of defendants' motion (mot. Seq. No. 3) to dismiss the cause of action based upon negligent hiring/retention and renewal of privileges. The court denied the branch of the motion to strike plaintiff's bill of particulars, and granted the branch of the motion pursuant to CPLR 3042(c) "to the following extent: Plaintiff shall serve a supplemental bill of particulars pursuant to the PC order dated 2/13/2018." The court also granted the branch of the motion to compel plaintiff, pursuant to CPLR 3101 and 3104, to provide a full disclosure of her prior and subsequent medical and psychiatric care, including "copies of records in her counsel's possession and authorizations to obtain records diagnostic

1

Another cause of action, based upon negligent hiring and retention, was dismissed (*see* order dated October 3, 2018 and entered on October 18, 2018).

studies and other pertinent records.” The court noted that plaintiff alleged “loss of enjoyment of life” and had agreed to provide such authorizations (pursuant to the PC order).

Plaintiff was deposed on October 19, 2018 and further deposed on August 12, 2019. During her deposition on August 12, 2019, plaintiff testified that within the prior ten months, she had seen a psychiatrist and a psychologist, who had offices in the same suite at an address in Rego Park, Queens, (New York) but could not recall their names. Plaintiff also testified as to the existence of various records and documents. Following the completion of plaintiff’s deposition, defendants served a revised second post-deposition demand and an amended revised second post-deposition demand (both dated September 11, 2019).

Meanwhile, plaintiff filed a note of issue on March 15, 2019. By so-ordered stipulation dated April 22, 2019 (EF Doc. No. 128), however, the note of issue was vacated, and plaintiff stipulated and agreed to provide certain records and “full medical disclosure authorizations of her medical and psychiatric care,” and a “supplemental bill of particulars as to alleged malpractice per the 10/3/2018 order.” By so-ordered stipulation dated October 15, 2019 (EF Doc. No. 129), plaintiff stipulated and agreed to provide the discovery demanded by defendants in the post-deposition demand dated September 11, 2019, within 30 days, and “to provide any further b/p directed in prior order.” Plaintiff also agreed that her daughter would submit to a non-party deposition on or before November 11, 2019. Plaintiff refiled a note of issue on December 6, 2019.

Defendants made this motion (mot. Seq. No. 4) on December 12, 2019, asserting that plaintiff has repeatedly failed to comply with discovery, including discovery demands and court-ordered discovery, and refiled the note of issue notwithstanding her failure to comply with discovery. In addition, defendants assert that plaintiff has not served a further bill of particulars.

On December 27, 2019, prior to the return date called for in the notice of motion, plaintiff’s daughter appeared for a non-party deposition. In addition, the parties entered into a so-ordered stipulation dated January 13, 2020, whereby (1) the return date for the motion was set for March 4, 2020, (2) plaintiff was directed to respond to defendants’ demand for copies of the transcript, passport, article, and authorizations, by providing defendants with a copy of the transcript of “def’s” deposition, the (internet) article which had been cited by plaintiff during her deposition and plaintiff’s passport, and authorizations for medical records of Drs. Kim, Choi, Khelemsky, Yuzbachyan, Katz, Jamil and Bruce, Forest Hills Acupuncture, and the psychiatrist mentioned by plaintiff in her further deposition, the psychological records of the psychologist mentioned by plaintiff in her further deposition, and the home care/personal care services records of “CDAP C [sic] Program for home health

aides.”² The so-ordered stipulation dated January 13, 2020 set February 26, 2020 as the deadline for the making of summary judgment motions. On March 4, 2020, the motion was adjourned and administratively rescheduled, prior to its being marked fully submitted on September 2, 2020.

In opposition to the motion, plaintiff contends that she has provided responses to all discovery demands, including producing a copy of her passport, deposition errata sheets, and executed deposition transcripts (including an emailed digital copy of the transcript of defendant Boris Abayev), the “link” to the internet article cited by plaintiff during her deposition testimony, and all authorizations for records of her medical treatment, including for the records of Dr. Nina Kim, Dr. Katherine Cho, NYU Neurology Associates, Dr. Serge Yakushin, c/o Ichan School of Medicine, The Life Wellness Center and Signature Home Care. Plaintiff also contends that she has not been ordered to supplement her bill of particulars, and no good cause has been shown by defendants warranting the granting of leave to extend the time in which they may make a summary judgment motion.

In reply, defendants assert that plaintiff repeatedly delayed in complying with discovery demands and orders, and did not provide most of the court-ordered discovery until May 2020, and still has not provided defendants with authorizations for certain records related to plaintiff’s psychiatric/psychological care and treatment. According to defendants, plaintiff has failed to identify the psychiatrist and psychologist with whom she consulted between the first and second sessions of her deposition, and instead served another authorization for Douglas J. Uhlig, PhD. Defendants also assert that plaintiff has failed to provide an authorization for records of CDPAP³ related to the rendering of home care services to plaintiff, in accordance with the so-ordered stipulation dated January 13, 2020.

Striking a pleading or prohibiting the introduction of evidence, pursuant to CPLR 3126, for failure to comply with disclosure is a drastic remedy, and is only appropriate where there is a clear showing that the failure to comply was willful, contumacious or in bad faith (*see Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Cioffi v S.M. Foods Inc.*, 142 AD3d 520 [2d Dept 2016]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 2091 [2d Dept 2012]). Willful and contumacious conduct may be inferred from

2

It appears that the parties were referencing the “Consumer Directed Personal Assistance Program” (CDPAP), a New York State Medicaid program which allows eligible persons, who require home care, to hire and direct their own home care workers (*see Dell’Olio v New York State Office of Temporary and Disability Assistance*, 166 AD3d 614 [2d Dept 2018]).

3

see n 2.

a party's repeated failure to comply with discovery, coupled with inadequate explanations for those failures, or a failure to comply with discovery over an extended period of time (*see Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013; *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2d Dept 2012]).

Plaintiff claims that she has "identified all psychiatrist and psychologist [sic] she saw between the first and second sessions of her deposition (meaning between October 2018 and August 2019) (not Dr. Uhlig)" (*see* letter dated May 1, 2020 of Matthew J. Salimbene, Esq., [EF Doc. #117]). Such response is evasive insofar as plaintiff testified at her deposition that she could not recall the names of the psychiatrist and psychologist, and still has failed to identify the psychiatrist and psychologist by name and address. The court, therefore, concludes plaintiff has failed to comply with the so-ordered stipulation dated January 13, 2020 in relation to providing the required authorizations.

To the extent plaintiff refuses to provide an authorization for the release of CDPAP records related to the home care/personal care services she has received, on the ground the records are "privileged, unduly burdensome, overly broad and not reasonably calculated to lead to relevant evidence" (*see* letter dated May 1, 2020 of Matthew J. Salimbene, Esq. [EF Doc. #117]), plaintiff previously agreed to provide such authorization (*see* so-ordered stipulation dated January 13, 2020 [EF Doc. #126]). As a consequence, any claim by plaintiff, at this juncture, that the CDPAP records are privileged, etc., has been waived. Plaintiff additionally has failed to present any excuse for her failure to provide the CDPAP authorization as required by the so-ordered stipulation dated January 13, 2020.

That branch of the motion by defendants pursuant to CPLR 3126 to strike the complaint or preclude plaintiff from offering certain testimony or evidence is granted to the extent of (1) precluding plaintiff from offering any testimony or evidence concerning alleged personal injuries to her mental health, unless plaintiff provides to defendants, within 10 days of the service of this order with notice of entry, HIPAA-compliant authorizations to obtain the medical records of the psychiatrist seen by plaintiff during the period between October 1, 2018 and August 31, 2019, pertaining to plaintiff's care or treatment, including mental health information of plaintiff, and the psychological records of the psychologist seen by plaintiff during the period between October 1, 2018 through August 31, 2019, pertaining to plaintiff's care or treatment, including mental health information of plaintiff, and notwithstanding whether plaintiff previously supplied those authorizations to defendants, and (2) precluding plaintiff from offering any testimony or evidence concerning plaintiff's need for, or receipt of, home care/personal care services, unless plaintiff provides to defendants, within 10 days of the service of this order with notice of entry, such HIPAA-compliant authorization to obtain the records of CDPAP pertaining to the home care/personal care services provided to plaintiff through CDPAP.

With respect to that branch of the motion by defendants to direct plaintiff provide a further bill of particulars to the alleged malpractice, plaintiff shall serve a supplemental bill of particulars within 30 days of the completion of the last party deposition. To the extent the last party deposition has already been completed,⁴ plaintiff shall serve a supplemental bill of particulars within 30 days of the date of service of this order with notice of entry.

That branch of the motion by defendants to vacate the note of issue is denied; the request for an extension of time to move for summary judgment is held in abeyance pending the pre-trial conference.

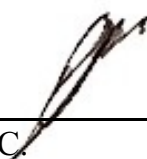
A telephone pre-trial conference with Chambers is scheduled as follows:

Date: Monday November 30, 2020

Time: 9:30a.m.

Method: contact Chambers at jhand@nycourts.gov for call-in instructions.

Dated: October 8, 2020

J.S.C. 

FILED

**10/8/2020
2:39 PM**

**COUNTY CLERK
QUEENS COUNTY**

⁴

Plaintiff's further deposition was held in August 2019, and defendant Abayev was deposed on or about September 11, 2019. However, it is unclear from these submissions whether defendant Abayev was deposed as a party witness on behalf of both defendants since no copy of the transcript of the deposition testimony of defendant Abayev has been provided to the court. On the other hand, plaintiff's counsel did not indicate in his affirmation of compliance dated December 6, 2019, filed with the note of issue, that a deposition of defendant Pain Management and Rehabilitation Services, P.C. remained outstanding.