

Levinsky v Berliner

2020 NY Slip Op 34224(U)

December 16, 2020

Supreme Court, New York County

Docket Number: 805150/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

S SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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RONALD F. LEVINSKY, as Executor of the Estate of THERESE LEVINSKY, deceased, and RONALD F. LEVINSKY, Individually,

Plaintiff,

- v -

RICHARD BERLINER, D.P.M., MT. KISCO FOOT SPECIALISTS, PLLC, JEREMY SIMON, M.D., BARBARA BOWE, M.D., JOSHUA WEINER, M.D., YULIYA TIPOGRAF, M.D., BARRY BREAUX, M.D., MAX O'DONNELL, M.D., and NEW YORK PRESBYTERIAN HOSPITAL,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 56, 57, and 58 (Motion 001)

were read on this motion to/for DISCOVERY SANCTIONS.

DECISION AND ORDER

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3126 to strike the answer of the defendant Jeremy Simon, M.D., or to impose other sanctions upon him, for his failure to appear for a deposition in accordance with prior discovery orders. Simon opposes the motion. The motion is granted to the extent that Simon shall submit to a deposition on or before February 16, 2021, and the motion is otherwise denied.

The plaintiff commenced this action on May 7, 2018. The plaintiff served Simon with copies of the summons and complaint by delivering those documents to a person of suitable age and discretion at Simon's actual place of business on May 11, 2018, and mailing an additional copy to Simon's actual place of business on May 14, 2018. The plaintiff filed proof of service on May 18, 2018. Simon served his answer on June 13, 2018. On July 18, 2018, the defendants Richard Berliner and Mt. Kisco Foot Specialists, PLLC, filed a request for a preliminary conference.

On September 25, 2018, the parties appeared for a preliminary conference. The Supreme Court (Shulman, J.) issued a preliminary conference order on that date, in relevant part, directing Simon to appear for a deposition on or before March 22, 2019. As of February 5, 2019, and thus prior to the deadline scheduled for Simon's deposition, the defendants had yet to conduct the plaintiff's deposition. On February 5, 2019, the court issued a compliance conference order rescheduling the plaintiff's deposition for April 26, 2019, but that order did not reschedule any of the defendants' depositions. In a status conference order dated May 7, 2019, the court rescheduled the depositions for all of the defendants, and directed that Simon's deposition was to be conducted on or before July 5, 2019. As of July 9, 2019, the plaintiff had yet to conduct a deposition of any of the defendants. In a second status conference order dated July 9, 2019, the court rescheduled Simon's deposition to be completed on or before September 27, 2019. Shortly thereafter, the plaintiff discontinued the action as against the defendants Barbara Bowe, Barry Breaux, Joshua Weiner, and Yuliya Tipograph.

In a third status conference order, dated October 8, 2019, Simon's deposition was adjourned until December 6, 2019. As of January 14, 2020, when the court conducted its fourth status conference, the depositions of three of the defendants, including that of Simon, remained outstanding; in the resultant discovery order, the court directed Simon's deposition to be conducted on or before February 25, 2020 and those of the other defendants to be conducted by March and April 2020.

The plaintiff was not able to conduct Simon's deposition on or before February 25, 2020. On March 17, 2020, the court was closed down due to the COVID-19 pandemic. On March 22, 2020, the courts suspended filings in all actions. Electronic filings were resumed on May 5, 2020, and in-person filings in connection with non-electronically filed actions were resumed on June 10, 2020. The parties were apparently unable to reschedule Simon's deposition until at least October 6, 2020, when the plaintiff made the instant motion.

CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” This language is “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). CPLR 3126 authorizes the court to sanction parties who “refuse[] to obey an order for disclosure or wilfully fail[] to disclose information which the court finds ought to have been disclosed” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998]). A party’s failure to satisfy his or her discovery obligations, particularly after a court order has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct warranting the striking of the[] [pleading]” (*id.*; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

Although the court has issued numerous discovery orders in this action, the depositions of all of the parties had been adjourned by the parties themselves on numerous occasions. Thus, the plaintiff “failed to establish that [Simon’s] conduct during discovery was willful, contumacious or in bad faith” (*Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]). In addition, the plaintiff sought no conditional order pertaining to discovery compliance prior to making this motion (see *Westchester Med. Ctr. v Amoroso*, 110 AD3d 580, 580 [1st Dept 2013]). Hence, he failed to establish a pattern of willful noncompliance with discovery obligations sufficient to warrant the drastic penalty of striking the answer or the preclusion of evidence at trial (see *id.*; see also *Aegis SMB Fund II, L.P. v Rosenfeld*, _____AD3d_____, 2020 NY Slip Op 07309 [1st Dept, Dec. 8, 2020] [defendant’s failure to appear at court-ordered mediation session was “neither willful nor part of a pattern of dilatory behavior”]).

Nonetheless, it is appropriate for the court to fix a firm deadline for Simon’s deposition (see CPLR 3124). Consequently, the court directs Simon to submit to a deposition on or before February 16, 2021. The court cautions Simon that his failure to submit to a deposition by that date may result in the entry an order precluding him from adducing evidence in support of his defenses at trial or an order conditionally striking his answer.

Accordingly, it is

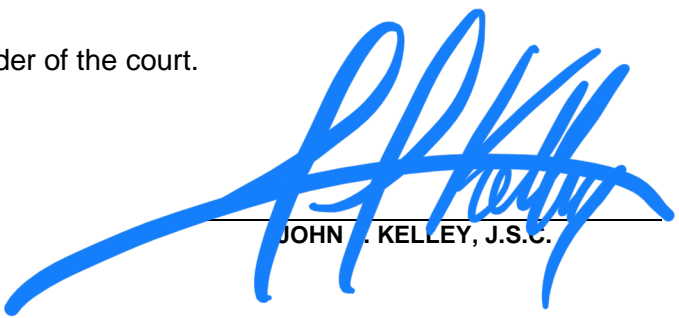
ORDERED that the plaintiff’s motion is granted to the extent that the defendant Jeremy Simon shall submit to a deposition on or before February 16, 2021, and the motion is otherwise denied; and it is further,

ORDERED that the deposition shall be conducted remotely, unless all parties stipulate otherwise, provided that Jeremy Simon’s attorney may be in the same room as he is during his deposition; and it is further,

ORDERED that the failure of Jeremy Simon to comply with this order may result in the entry an order precluding him from adducing evidence in support of his defenses at trial or an order conditionally striking his answer.

This constitutes the Decision and Order of the court.

12/16/2020
DATE



JOHN J. KELLEY, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | | REFERENCE |