

Badome v Zaret

2020 NY Slip Op 34786(U)

August 5, 2020

Supreme Court, Nassau County

Docket Number: Index No. 603060/2017

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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JOSEPH BADOME AND ANNETTE BADOME,

**IAS Part 12
Index No. 603060/2017
Mot. Seq. No. 003**

Plaintiffs,

-against-

DECISION AND ORDER

**DAVID I. ZARET, M.D., AND ORLIN & COHEN
ORTHOPEDIC ASSOCIATES, LLP,**

Defendants.

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LEONARD D. STEINMAN, J.

The following papers were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits.....	1
Plaintiffs' Affirmation in Opposition.....	2
Defendants' Reply Affirmation.....	3
Defendant's Affirmation of Attorney Fees & Exhibit.....	4
Plaintiff's Further Affirmation in Opposition.....	5

This medical malpractice action was commenced in 2017 against defendants regarding their treatment of a broken ankle sustained by plaintiff Joseph Badome while at work in 2014. Defendants now move to dismiss the action because of plaintiffs' continued failure to meet their discovery obligations. Plaintiffs oppose the application.

PROCEDURAL HISTORY

From its commencement, this action has been a protracted endeavor to pry discovery from plaintiffs. In May 2017, along with their respective answers, defendants served plaintiffs with demands for a Verified Bill of Particulars and other discovery. The demands were met with silence. Over the next 1 year and 5 months, defendants sent three good faith letters for the overdue discovery without a response. As a result,

defendants were required to file a motion to compel in November 2018. That motion was administratively withdrawn pursuant to Nassau County DCM Rules and Uniform Rule 202.19, and the matter was set down for a Preliminary Conference.

On December 6, 2018, the date of the Preliminary conference, plaintiffs served their bills of particulars. The bills of particulars failed to identify the injuries suffered by plaintiffs as requested and failed to particularize the claimed departures from the standards of care. On that date, this court issued a Preliminary Conference Order which required, in part, that plaintiffs provide a supplemental bill of particulars within 45 days and all outstanding authorizations within 30 days from the date of the order.

After those time frames expired, defendants followed up with good faith letters requesting the outstanding discovery from plaintiffs. Defendants finally received a supplemental bill of particulars (purportedly dated January 4, 2019) via email on April 9, 2019, but it merely stated that plaintiff Joseph Badome suffered “complications of left ankle fracture including infection and further surgeries and procedures.” As noted above, defendants treated plaintiff Joseph Badome for a fractured ankle. No other information regarding injuries, treatment, surgeries or procedures was provided by plaintiffs.

On April 16, 2019 this court issued a Compliance Conference Order, directing, among other things, that plaintiffs provide a second supplemental bill of particulars setting forth the specific injuries being claimed and the subsequent treating doctors within 15 days and original authorizations for all providers within 7 days. The Compliance Conference Order also directed that responses to any post-deposition demands be provided within 14 days of receipt of such demands.

Following the deposition of Joseph Badome, defendants served post-deposition demands on May 31, 2019. Plaintiffs failed to timely respond notwithstanding this court’s April 16 Order. Once again, defendants had to bring to this court’s attention

plaintiffs' failure to abide by prior Orders. As a result, by Order dated July 2, 2019, this court directed that plaintiffs respond to the May 31 demand within 15 days.

In August 2019 several items of discovery still remained outstanding from plaintiffs. With permission of this court, defendants filed a second motion to compel. In that application, defendants detailed discovery that remained due and owing from plaintiffs, including a second supplemental bill of particulars "particularizing plaintiff's allegations of negligence; alleging specific special damages as to lost earnings and loss of services; and setting forth specific injuries alleged to have been caused by the claimed malpractice." By a So-Ordered Stipulation dated September 16, 2019, defendants' motion was resolved. In part, plaintiffs were to provide a notebook and calendar of appointments and treatment maintained by plaintiff wife Annette Badome (as requested in defendants' post-deposition demand) within 7 days.

On October 29, 2019, a Certification Order was issued, signed by the parties. But discovery was not yet complete. In a separate stipulation, the parties agreed to continue to exchange discovery until the filing of plaintiffs' note of issue. Specifically, plaintiffs agreed to provide written responses to defendants' demands dated May 24, 2017, May 27, 2017, May 31, 2019, August 16, 2019 and September 6, 2019. Nonetheless, plaintiffs once again failed to provide timely responses to outstanding demands which necessitated a telephone conference with the parties and this court on January 21, 2020. During that conference, plaintiffs agreed to provide all outstanding discovery by January 27, 2020. Plaintiffs provided a response to defendants' combined discovery demands on such date. Nearly all of those demands were responded to in one of two ways: "not in possession of the plaintiffs" or "previously provided." That same day, plaintiffs also filed their note of issue.

This court's most recent involvement in the parties' ongoing discovery disputes was on February 3, 2020, when it conducted a conference via telephone. After

discussions between the parties, plaintiffs agreed to provide the following by February 14: another supplemental bill of particulars; the “calendar of treatment” referenced by Annette Badome in her deposition; the time, date and location of all photographs previously exchanged by plaintiffs; and the original deposition transcript of David I. Zaret, M.D.

Defendants contend that all items of discovery discussed in the February 3 telephone conference remain outstanding, requiring them to make the instant application. Defendants now argue that plaintiffs’ complaint should be dismissed for their repeated failure to provide discovery necessary to the defense of this action. Specifically, defendants contend that plaintiffs’ allegations of negligence as set forth in their bills of particulars are general, not specifically tailored to this action and fail to put defendants on notice of the alleged claims of malpractice. In the same vein, the supplemental bill of particulars provides only a vague indication of the injuries alleged to have been suffered by Joseph Badome. Defendants contend that plaintiffs’ failure to provide discovery is an intentional pattern of delay in prosecuting their action.

Counsel for plaintiffs filed an Affirmation in Opposition to the instant motion on June 8, 2020 wherein counsel affirmed that on *that date*, and prior dates, the attached discovery was provided to defendants “in full compliance with all court orders, stipulations, and demands...”

During oral argument on defendants’ motion, the court offered defendants an opportunity to submit their expenses resulting from plaintiffs’ failure to timely abide by their discovery obligations. Plaintiffs were given an opportunity to respond to this submission.

LEGAL ANALYSIS

“[I]f the credibility of Court orders and the integrity of the judicial system are to be maintained, a litigant cannot ignore Court orders with impunity.” *Kihl v. Pfeffer*, 94 N.Y.2d

118 (1999). CPLR § 3126 provides that the court has discretion to compel discovery or dismiss a complaint for failure to abide with discovery and disclosure orders. The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Ozeri v. Ozeri*, 135 A.D.3d 838 (2d Dept. 2016); *Silberstein v. Maimonides Med. Ctr.*, 109 A.D.3d 812 (2d Dept. 2013); *Commisso v. Orshan*, 85 A.D.3d 845 (2d Dep. 2010).

A court may look to a party's repeated failure to respond to demands or to comply with court ordered discovery and "infer that a party is acting willfully and contumaciously." *Silberstein v. Maimonides Med. Ctr.*, 109 A.D.3d 812 (2d Dept. 2013); *see also Powell v. Cipollaro*, 34 A.D.3d 551, 551 - 552 (2d Dept. 2006). The court, when faced with a party's failure to disclose information sought by the opposing side in an action, may issue a conditional preclusion order, an order deeming the issues resolved in the movant's favor or a default judgment against the delinquent party. *Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 79 (2010). The court may also impose a monetary sanction as a result of the delay. *See Dean v. Campagna*, 44 A.D.3d 603 (2d Dept. 2007).

As recognized by Chief Justice Janet DeFiore's Excellence Initiative, the just and *timely* disposition of disputes is the core obligation of our justice system. *See The State of Our Judiciary 2017; Excellence Initiative: Year One*, p. i. The failure of litigants to diligently pursue discovery is one of the primary causes for delay in civil cases. And the delays are not caused solely by defendants seeking to prolong judgment day. Surprisingly—and disappointingly—plaintiffs are often guilty of procrastination, perhaps explained by overworked counsel or overwhelming evidence.

Here, it cannot be said that plaintiffs wholly failed to provide responses to discovery demands to date. Rather, plaintiffs' responses are not to the satisfaction of defendants, understandably so, as they are incomplete, vague or inadequate. Most importantly, plaintiffs' "Further Supplemental Responsive Bill of Particulars" dated March 7, 2020 attached to their opposition is completely unchanged from their January 2019 supplemental bill of

particulars with respect to the injuries allegedly sustained by Joseph Badome. The only item actually supplemented regards loss of earnings to which plaintiffs responded: “the plaintiff was an employee of Pepsi Cola and lost time and income totaling \$1,000,000.000.” Plaintiffs still fail to respond with information with respect to Joseph Badome’s gross earnings. Further, the photographs furnished by plaintiffs now reflect a date, but still do not provide a time and location¹ as requested by defendants. Plaintiffs again provide, just as they have repeatedly done, handwritten notes kept by Annette Badome, but still have not proffered a calendar.

Although obstinate and chronically laggard, this court does not find that plaintiffs’ delay in fully complying with discovery justifies the drastic remedy of outright dismissal of the action. See *A.F.C. Enters, Inc. v. New York City School Constr. Auth.*, 33 A.D.3d 737 (2d. Dept. 2006). A conditional order of dismissal is more appropriate. Furthermore, plaintiffs’ conduct during the discovery process warrants a monetary sanction to compensate defendants for the time expended and costs incurred in connection with their multiple requests for court relief. *L&L Auto Distribs. & Suppliers Inc. v. Auto Collection, Inc.*, 85 A.D.3d 734 (2d Dept. 2011). Although plaintiffs assert in opposition to the imposition of sanctions that they have “never failed to provide any court ordered discovery in a timely fashion,” this is simply untrue.

Defendants have submitted time records totaling \$2,945 for the three motions they were required to make. But this sum does not include the expense of preparing for and participating in oral argument, phone conferences and emails with the court dedicated to plaintiff’s failure to produce discovery, and good faith letters sent to plaintiff’s counsel.

Given the foregoing, defendants’ motion is granted to the extent that it is hereby

ORDERED, that plaintiffs’ note of issue is stricken; and it is further

ORDERED, that this action is hereby conditionally dismissed unless plaintiffs:

¹ It is unclear why the time and location are relevant but plaintiffs never objected to provided this information.

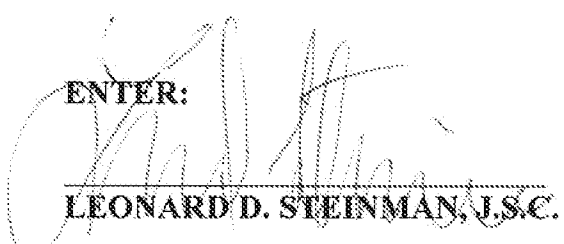
- A. Serve no later than August 25, 2020: (1) another supplemental bill of particulars which specifies in particularity: (a) the standards of medical care alleged to have been breached by the defendants and the precise manner in which defendants deviated from such standards of care, as will be proven at trial; (b) the injuries plaintiffs assert were caused by such departures including: (i) the nature and extent of the alleged resulting infection, (ii) the exact complications alleged; (2) the calendar of medical appointments and treatment or an affidavit that such does not exist; (3) authorizations to obtain medical and hospital records from the doctors and hospitals from whom/at which plaintiff Joseph Badome received treatment as a result of the claimed malpractice if not already produced; and
- B. Pay to defendants the sum of \$3,500 no later than August 25, 2020; and it is further

ORDERED, that the parties are to appear for a virtual re-certification conference on August 27, 2020.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: August 5, 2020
Mineola, New York

ENTER:

 LEONARD D. STEINMAN, J.S.C.

ENTERED
 Aug 07 2020
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE