

Woloszuk v Elizabeth Wende Breast Clinic, LLC
2020 NY Slip Op 35783(U)
July 3, 2014
Supreme Court, Monroe County
Docket Number: Index No. 09/6547
Judge: William P. Polito
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SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

Ellen Woloszuk and Jacek Woloszuk,

Plaintiffs,

Index No. 09/6547

V.

Elizabeth Wende Breast Clinic, LLC,
Wende Logan-Young, M.D.,
Philip Murphy M.D.,
Southeast Obstetrics & Gynecology P.C.,
And Rita Clement, M.D. ,

Defendants.

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Motion heard on June 27, 2014

DECISION AND ORDER

POLITO, J.

Relief Requested:

Defendant Elizabeth Wende Breast Clinic, LLC, Wende Logan-Young M.D. and Philip Murphy, M.D. seek an order striking a trial decision based upon plaintiff's failure to submit a written order within 60 days of the trial ruling, or in the alternative an order for leave to renew defendants' opposition to sanctions for failure to disclose computer documents.

Plaintiff opposes and cross moves for an order extending the prior sanctions order against Dr Wende Logan-Young, M.D., by striking the answer of Dr Wende Logan-Young M.D. and granting judgment; settling the sanctions order to also include plaintiffs' duplicate medical expenses; compelling production of the insurance policies covering Dr Logan-Young, Dr Murphy, and the Clinic.

Decision:

Defendant's motion to strike the relief awarded in a prior trial decision as abandoned, or in the alternative, for an order granting leave to renew are denied.

Plaintiff's cross motion is denied seeking a judgment against Dr Logan-Young, and granted as to duplicate medical expenses; and granted as to compelling production of the insurance policies as previously agreed to.

Failure to reduce trial decision to a written order:

Defendants contend that plaintiff's failure to reduce the Court's trial decision to an order and have it signed and entered within 60 days is fatal to the sanctions relief granted as an abandonment of the decision.

CPLR 2219 states "an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or **otherwise recorded**." (See also *People v. Elmer*, 19 NY3d 501,508 (2012) dicta). 22 NYCRR 202.48 states that "(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted. (b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown."

Here, during jury selection, the Court on March 19, 2014 rendered an oral decision on the record striking defendant party LLC's answer for intentionally failing to produce certain computer generated records, which it denied existed, but had previously produced in another similar malpractice case against it.

Even assuming that the Court's transcribed decision was not "otherwise recorded" for purposes of CPLR 2219 and 22 NYCRR 202.48, and must be reduced to a written order, upon defendants' counsel's own admission, the decision was reduced to an order by defendants and forwarded to plaintiffs, but never agreed to, including a dispute on the proper party defendant or defendants. Defendants submit that plaintiffs have done nothing to produce the order, but request more time as they were seeking information about whether Elizabeth Wende Breast Clinic has insurance. However, neither did proponent make any effort to resolve the dispute as to the proper party(ies) or to have the Court settle the record.

Clearly, upon review of defendants' own submissions, plaintiff has not abandoned the order but rather, the parties, in documents solely between themselves, have been unable to agree on an order. At minimum, plaintiff have the requisite good cause for failing to submit, or more importantly, agree to an order especially under the circumstances here, where defendants, upon their own accord, drafted and circulated an order which was not agreed to, was countered, which likewise was not agreed to, and neither party sought the Court's assistance until this motion several weeks later.

Accordingly, defendants motion for an order striking the relief granted based on abandonment is denied.

Motion to Renew:

Defendants in the alternative seek to renew their prior opposition to plaintiff's motion for sanctions on the basis that they have newly discovered evidence. The newly discovered evidence is not evidence, but rather, expert opinion on whether the computer generated records are relevant. To a large degree, those claims were in their opposing papers.

The motion to renew is denied. The only named defendant business entity, an LLC, was sanctioned for its conduct in intentionally and knowingly failing to submit or disclose computer generated records, that it had belatedly produced in a similar prior malpractice case, and had knowledge of thereby. To argue now that they had no knowledge of the records or that the records were not relevant is disingenuous. Further, defendant has failed to submit a reasonable excuse as to why it knowingly failed to submit, or even disclose, the records during discovery, or to disclose and then assert that the records were not relevant and therefore not discoverable.

Accordingly, defendants' motion for leave to renew is denied.

Plaintiff's cross motion is denied in part.

Plaintiff seeks an order extending the sanctions judgment against also Dr Logan-Young on the basis that the proper sanctioned business entity should also include the defendant operating as a DBA sole proprietor, as well as its successor LLC, as sued, based upon an admission by defendant's counsel in the transcript dated 3/19/14 (Ex. R at page 7 of plaintiff cross motion dated 6/23/14).

At this point, however, neither party has moved with evidentiary submissions to amend the pleadings to add the proper party or parties, or to change any party, nor has discovery been requested regarding whether the LLC entity may be contractually liable, or liable by assuming continuing care of the patients of the predecessor sole proprietorship from whom it received donated assets. Although it is alleged that defendants failed to properly diagnose in 2006, when defendant Dr Logan-Young was operating as a sole proprietorship, the lawsuit was commenced against the LLC party which had retained the documents was named in the action and had failed to produce or disclose resulting in the sanctions. The Court in its decision referred to the sanctions as against the "clinic" party (3/18/14 Transcript Ex. Q at page 28 of plaintiff's cross motion dated 6/23/14). Ms. Somerset represented the individual, Dr. Logan-Young, who was the d/b/a sole owner, and the LLC. In the said prior similar suit, which is relevant to the sanctions motion, she represented the LLC, and the d/b/a, in which both were sued as

separate entities and both as a corporation, and a partnership. (ID., Ex. F). In that prior suit, the negligence is alleged to have occurred between April 6, 2007 and March 6, 2008 at which time Dr. Wende Logan-Young was operating as a sole proprietor and the successor LLC was formed approximately September 20, 2008. (ID., Ex. G).

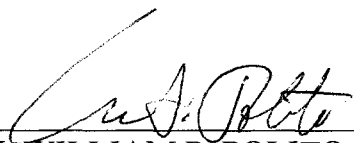
The party sanctioned here by the Court was the only business entity indicated in the pleadings, the LLC. Further, since a sole proprietorship and individual are one and the same, if that be the case here, an amendment to add the DBA as a separate party may not be necessary, but simply an agreement to change title of the proceedings to indicate Dr. Logan-Young d/b/a Elizabeth Wende Breast Clinic.

Accordingly, plaintiff's cross motion to extend the sanctions judgment to also include Dr Logan-Young is denied without prejudice, upon resolution of the alleged disposition of the proper party(ies). The cross motion as previously stated is granted as to plaintiff's requested expenses, which were incurred in the first aborted similar action and will be required to be paid again in the next trial (3/18/14 transcript Ex. Q at page 29 of plaintiff's cross motion dated 6/23/14), and also granted is the requested production of the insurance policies previously agreed to.

This shall constitute the decision and order of the Court. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notice of entry. Attorney for the plaintiffs is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this decision with notice of entry.

SO ORDERED.

Dated this 3rd day of July, 2014 at Rochester, New York.


HON. WILLIAM P. POLITO
JUSTICE SUPREME COURT