

Nelson v New York & Presbyt. Hosp.

2021 NY Slip Op 30227(U)

January 19, 2021

Supreme Court, New York County

Docket Number: 805320/2016

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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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CODY NELSON,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL, JEFFREY BRUCE, M.D., BRAD ZACHARIA, M.D., ROBERT MCGOVERN, M.D., JOHN GREGORY GAUDET, M.D., formerly known as JOHN GREGORY VAN DRIEST, M.D., EUGENE ORNSTEIN, M.D., HEMANT VARMA, M.D., and JEAN PAUL VONSATTEL, M.D.

Defendants.

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The following e-filed documents, listed by NYSCEF document number 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72 (Motion 003)

were read on this motion to/for DISCOVERY SANCTIONS.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3126 to strike the answer of the defendants The New York and Presbyterian Hospital (NYPH), Robert McGovern, M.D., John Gregory Gaudet, M.D., Eugene Ornstein, M.D., and Hemant Varma, M.D. (collectively the subject defendants) for their failure to appear for depositions in accordance with prior discovery orders or, in the alternative, to compel them to submit to depositions by a date certain. The defendants oppose the motion. The motion is granted to the extent that Dr. McGovern shall submit to a deposition on or before March 11, 2021, Dr. Gaudet shall submit to a deposition on or before March 25, 2021, Dr. Ornstein shall submit to a deposition on or before April 8, 2021, Dr. Varma shall submit to a deposition on or before April 22, 2021, and NYPH shall submit to a deposition on or before May 6, 2021, subject to the imposition of sanctions should they fail to appear, and the motion is otherwise denied.

DECISION AND ORDER

The plaintiff commenced this action on August 9, 2016 against seven individual physicians and NYPH. On February 21, 2017, the parties appeared for a preliminary conference. The Supreme Court (Shulman, J.) issued a preliminary conference order on that date, in relevant part, directing the plaintiff to appear for a deposition on or before May 4, 2017, and the seven individual defendants to appear for depositions on various dates between May 25, 2017 and September 28, 2017. No date was scheduled for NYPH's deposition. On May 10, 2017, when the parties appeared for a compliance conference, the defendants had yet to conduct the plaintiff's deposition, and the plaintiff had yet to conduct the depositions of any of the defendants. In the resultant compliance conference order, the court (Shulman, J.), directed the plaintiff's deposition to be conducted on or before June 8, 2017, and the depositions of the seven individual defendants to be conducted on various dates between June 29, 2017 and November 2, 2017.

On October 3, 2017, the plaintiff moved pursuant to CPLR 3124 to compel the defendants to conduct his deposition. On October 17, 2017, the defendants conducted the plaintiff's deposition. By so-ordered stipulation dated December 12, 2017, the parties resolved the outstanding CPLR 3124 motion, and agreed that the plaintiff would provide additional authorizations by a date certain, that the individual defendants would produce their curricula vitae by a date certain, and that the first-named individual defendant, Jeffrey Bruce, M.D., would be deposed on or before February 2, 2018, with the other defendants' depositions to be scheduled at a March 6, 2018 status conference. Bruce was not deposed by February 2, 2018. In the status conference order issued upon completion of the March 6, 2018 conference (Shulman, J.), the court fixed deadlines for completing the depositions of each of the eight defendants on various dates between April 6, 2018 and September 21, 2018.

In a "compliance" conference order dated May 1, 2018 (Shulman, J.), Bruce's deposition, which had yet to be conducted, was again rescheduled, this time for a date on or before June 26, 2018. The order left unaddressed the scheduling of the McGovern's deposition,

although the other defendants' depositions were scheduled for various dates between July 17, 2018 and December 30, 2018. The plaintiff completed Bruce's deposition on July 20, 2018.

In a "compliance" conference order dated July 31, 2018 (Shulman, J.), the depositions of the defendants Brad Zacharia, M.D., and Jean Paul Vonsattel, M.D., were scheduled for August 3, 2018 and September 21, 2018, respectively, but McGovern's deposition remained unaddressed. When the parties again appeared for a status conference on January 15, 2019, neither Zacharia nor Vonsattel's depositions had been conducted; in the resultant order, the court (Shulman, J.) rescheduled those two depositions, and scheduled the depositions of all of the remaining defendants, save Bruce, directing those remaining defendants to appear for depositions on various dates on or before February 22, 2019 and May 17, 2019. The plaintiff conducted Zacharia's deposition on January 18, 2019.

On February 19, 2019, the parties appeared for another status conference. In the resultant order (Shulman, J.), the court rescheduled depositions of Vonsattel, McGovern, Ornstein, Gaudet, Varma, and NYPH for various dates between March 7, 2019 and June 20, 2019. In a follow-up status conference order (Shulman, J.) dated April 9, 2019, the court again rescheduled the depositions of these six remaining defendants, this time for various dates between May 2, 2019, and July 15, 2019. The defendants produced Vonsattel for a deposition on July 23, 2019. The plaintiff commenced Vonsattel's deposition on that date, continued it, and thereafter completed the deposition on December 18, 2019.

The parties appeared for four additional status conferences on June 25, 2019, August 6, 2019, November 19, 2019, and February 11, 2020, respectively. In the orders resulting from these conferences, the court (Shulman, J.), rescheduled the depositions of the five subject defendants several times, with the most recent order directing the defendants to produce McGovern on or before February 28, 2020, Ornstein on or before March 28, 2020, Gaudet on or before April 2, 2020, Varma on or before April 17, 2020, and NYPH on or before May 2, 2020.

The defendants did not produce McGovern for a deposition on or before February 28, 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. On May 2, 2020, the Chief Administrative Judge of the New York State Courts issued Administrative Order 88/20, providing that New York courts “shall not order or compel, for a deposition or other litigation discovery, the personal attendance of physicians or other medical personnel . . . who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients.” The Administrative Order also provided that “parties are encouraged to pursue discovery in cooperative fashion to the fullest extent possible.” 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. On that same date, the Supreme Court, New York County, reopened for justices and judicial staff. On June 22, 2020, Administrative Order 88/20 was rescinded, while the Chief Administrative Judge continued to urge parties “to pursue discovery in a cooperative fashion and to employ remote technology in discovery wherever possible.”

The parties were apparently unable to reschedule the deposition of the subject defendants as of November 19, 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]).

There have been 14 discovery conferences and one prior motion to compel discovery in this action over a three-year period. Even before the court was compelled to shut down due to the COVID-19 pandemic, the subject defendants had failed to submit to depositions in accordance with the first 13 discovery orders. The plaintiff, however, apparently consented to several adjournments of the defendants' depositions, while three of the defendants, who are represented by the same attorneys as the subject defendants, have submitted to depositions. In light of the foregoing, the plaintiff "failed to establish that [the subject defendants'] 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.*).

Nonetheless, given the long delays and the numerous discovery orders with which the subject defendants have failed to comply prior to the onset of the COVID-19 crisis, it is appropriate for the court to fix a firm deadline for the subject defendants' depositions (see CPLR 3124), subject to the imposition of sanctions if they do not comply with this order.

Consequently, the court directs that Dr. McGovern submit to a deposition on or before March 11, 2021, Dr. Gaudet submit to a deposition on or before March 25, 2021, Dr. Ornstein submit to a deposition on or before April 8, 2021, Dr. Varma submit to a deposition on or before April 22, 2021, and NYPH submit to a deposition on or before May 6, 2021. The court cautions these defendants that their failure to submit to depositions by those dates may result in the entry

an order precluding them from adducing evidence in support of their defenses at trial or an order conditionally striking their answers.

Accordingly, it is

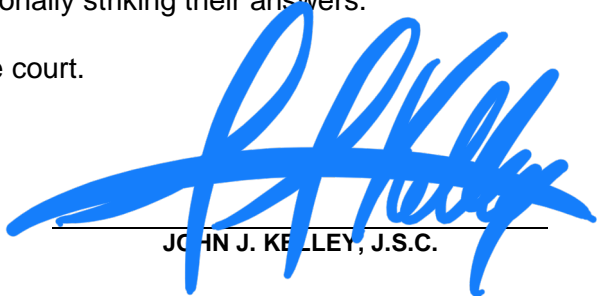
ORDERED that the plaintiff's motion is granted to the extent that the defendant Robert McGovern shall submit to a deposition on or before March 11, 2021, the defendant John Gregory Gaudet shall submit to a deposition on or before March 25, 2021, the defendant Eugene Ornstein shall submit to a deposition on or before April 8, 2021, the defendant Hemant Varma shall submit to a deposition on or before April 22, 2021, and the defendant The New York and Presbyterian Hospital shall submit to a deposition on or before May 6, 2021, and the motion is otherwise denied; and it is further,

ORDERED that the depositions shall be conducted remotely, unless all parties stipulate otherwise, provided that the subject defendants' attorney may be in the same room as they are during their depositions; and it is further,

ORDERED that the failure of the defendants Robert McGovern, John Gregory Gaudet, Eugene Ornstein, Hemant Varma, and The New York and Presbyterian Hospital to comply with this order may result in the entry an order precluding any or all of them from adducing evidence in support of their defenses at trial or an order conditionally striking their answers.

This constitutes the Decision and Order of the court.

1/19/2021
DATE



JOHN J. KEEFEY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE