

<b>Jane Doe v Lenox Hill Hosp.</b>
2021 NY Slip Op 30577(U)
March 1, 2021
Supreme Court, New York County
Docket Number: 159628/2016
Judge: John J. Kelley
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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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JANE DOE,

Plaintiff,

- v -

LENOX HILL HOSPITAL, NORTHWELL HEALTH, INC., formerly known as NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC., and FRANCISCO JOSE LINARES ALVARENGA, M.D.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 130, 131, 132, 133, 124, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 147, 148, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, and 161 (Motion 006)

were read on this motion to/for IMPOSITION OF DISCOVERY SANCTIONS.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3126 for the imposition of monetary sanctions upon the defendants Lenox Hill Hospital and Northwell Health, Inc. (together the Lenox Hill defendants), for their alleged failure to comply with discovery requests and orders. The Lenox Hill defendants oppose the motion. The motion is denied.

By order dated July 9, 2019, the Supreme Court, New York County (Freed, J.), granted the plaintiff's motion pursuant to CPLR 3124 to compel the Lenox Hill defendants to permit the plaintiff's representative to enter onto the premises of the Lenox Hill Hospital building, located at 100 East 77th Street in Manhattan, for "inspecting, documenting, photographing, or videotaping offices, viewing angles, rooms, and walkways." In a series of 10 email messages exchanged between the plaintiff's counsel and counsel for the Lenox Hill defendants between July 17, 2019 and September 25, 2019, those parties unsuccessfully attempted to work out the scheduling and logistics of the site visit and inspection. The plaintiff, in particular, sought to work out a

schedule convenient for her retained photographer. She indicated that she did not wish to proceed with the site visit until the Lenox Hill defendants provided her with blueprints or floor plans of the subject premises. The plaintiff also objected when those defendants suggested that a hospital administrator take the photos or videos instead of her photographer or videographer. In a September 30, 2019 conference, the court (Freed, J.) granted leave to the plaintiff to move pursuant to CPLR 3126 for the imposition of sanctions upon the Lenox Hill defendants' for their alleged failure to comply with the terms of the July 9, 2019 order. By email message dated October 17, 2019, the plaintiff's counsel advised counsel for the Lenox Hill defendants that the plaintiff anticipated making such a motion after October 23, 2019. In a responsive email dated October 21, 2019, defense counsel wrote as follows:

"I have been in touch with a number of people in various departments at the hospital in an effort to obtain the floor plan. As I have stated, this is not a simple issue. Access to the psychiatric unit is much different than access a general floor or common area of the hospital, there are a number of privacy and safety concerns at issue. My client intends on complying with the order, but I cannot allow haste to put the hospital at risk for a HIPAA violation. That being said, the hospital is aware that this cannot be delayed any further. At this juncture, a motion will only create more delay. Can we agree to speak at the end of the week with a goal of finalizing a plan at that time?"

The plaintiff's counsel replied that he could wait no longer to conduct the site inspection, and that he would be making the CPLR 3126 motion returnable on November 12, 2019. On October 24, 2019, the plaintiff made the instant motion and, as promised, initially set November 12, 2019 as the return date for the motion. On November 27, 2019, the Lenox Hill defendants submitted opposition to the motion, contending that their delay in scheduling the site visit was not willful and contumacious, as they continued in good faith to attempt to work out the logistics and timing of the visit with the plaintiff.

The court (Freed, J.) first adjourned the return date of the motion until December 17, 2019, and then until January 31, 2020. By email correspondence dated January 9, 2020, and thus while this motion was pending, the parties' counsel agreed that the site inspection and video or photographic recording would be conducted on January 24, 2020. The plaintiff filed

reply papers the very next day, arguing that the Lenox Hill defendants should still be subject to a monetary sanction despite the fact that the inspection was scheduled for a firm date. The inspection was conducted on January 24, 2020. In the meantime, the court (Freed, J.) adjourned this motion until March 31, 2020.

On March 17, 2020, however, 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, although the Chief Administrative Judge continued to urge parties “to pursue discovery in a cooperative fashion and to employ remote technology in discovery wherever possible.”

This motion consequently was adjourned until August 18, 2020, and then again until October 7, 2020. In a so-ordered stipulation dated October 26, 2020, the parties agreed that

“Plaintiff’s motion to compel inspection of Lenox Hill Hospital was substantially addressed with an inspection in January 2020. Outstanding photographs of the actual patient room in the Psychiatric Department will be provided by Lenox Hill Hospital as soon as the staff can take photos of the room when it is not occupied by patients. Plaintiff’s motion is adjourned until the date of the next C[ompliance] C[onference] pending receipt of these photographs of the patient room.”

The action was thereafter reassigned to this court.

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]). “The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court” (*Lazar, Sanders, Thaler & Assoc., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; see *Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

“Although not expressly set forth as a sanction under CPLR 3126, . . . the imposition of a monetary sanction under CPLR 3126 may be appropriate to compensate counsel or a party for the time expended and costs incurred in connection with an offending party’s failure to fully and timely comply with court-ordered disclosure”

(*Lucas v Stam*, 147 AD3d 921, 926 [2d Dept 2017]; see *Maxim, Inc. v Feifer*, 161 AD3d at 554).

A party’s failure to satisfy its discovery obligations, particularly after a court order has been issued, “may constitute the dilatory and obstructive, and thus contumacious, conduct” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]). The plaintiff failed to establish that the Lenox Hill defendants’ conduct during discovery was willful, contumacious, or in bad faith (see *Lee v 13th St. Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018]; *Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]). At the time that this motion was made, those defendants were in violation of a single court order, and the parties’ submissions warrant the conclusion that they attempted in good faith to comply with that order. The Lenox Hill defendants’ conduct thus does not constitute a “pattern of disobeying court orders and failing to comply with disclosure obligations” (*Amini v Arena Constr. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]; see *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]).

Moreover, where, as here, the party from whom discovery is sought ultimately complies with the disputed discovery order, and satisfies its discovery obligations within a reasonable time after the issuance of the order, the imposition of sanctions is rarely warranted (see *Marte v*

*City of New York*, 102 AD3d 557, 558 [1st Dept 2013]; *Sau Ting Cheng v Prime Design Realty, Inc.*, 44 AD3d 644, 645 [2d Dept 2007]; *Resnick v Schwarzkopf*, 41 AD3d 573, 573 [2d Dept 2007] [substantial compliance with discovery obligations, even where tardy, does not warrant imposition of sanction]; *Nussbaum v D'Amico*, 29 AD3d 449 [1st Dept 2006]). The imposition of a monetary sanction is warranted only where an unexcused delay is significant (see *Knoch v City of New York*, 109 AD3d 459, 459 [2d Dept 2013] [three-year delay]; *Friedman, Harfenist, Langer & Kraut v Richard Bruce Rosenthal*, 79 AD3d 798, 801 [2d Dept 2010] [more than one-year delay]) or a party willfully refuses to comply with its discovery obligations (see *Maxim, Inc. v Feifer*, 161 AD3d at 554). The delay here was not significant and, in any event, was partly attributable to the plaintiff's informal demand that the Lenox Hill defendants produce blueprints and floor plans of the hospital before conducting the inspection, as well as the parties' attempts to schedule a date when all necessary persons were available.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

3/1/2021  
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 DATE



JOHN J. KELLEY, J.S.C.

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