

Newhem v Millos

2021 NY Slip Op 30852(U)

March 2, 2021

Supreme Court, New York County

Docket Number: 805203/2019

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X

INDEX NO. 805203/2019

IAN BLAKE NEWHEM, as Executor of the Estate of STEPHEN J. NEWMAN, Deceased, and IAN BLAKE NEWHEM, as Executor of the Estate of MARIS B. NEWMAN, Deceased,

MOTION DATE 09/03/2020

Plaintiff,

MOTION SEQ. NO. 002

- v -

ROSANA T. MILLOS, M.D., HUDSON VALLEY MEDICAL ASSOCIATES, PLLC, BRIJENDER BATRA, M.D., PULMONARY CONSULTANTS, P.C., LYALL A. GORENSTEIN, M.D. and ROCKLAND THORACIC & VASCULAR ASSOCIATES, P.C.,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 66, 67, and 68 (Motion 002)

were read on this motion to/for COMPEL DISCLOSURE/IMPOSE DISCOVERY SACTIONS

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves pursuant to moves pursuant to CPLR 3124 and 3126 to compel the defendants Brijender Batra, M.D., and Pulmonary Associates, PLLC (together the Batra defendants) to respond to outstanding discovery demands and requests or, in the alternative, to strike the answer for their alleged failure to comply with discovery requests and orders. The Batra defendants oppose the motion. The motion is denied.

On January 6, 2020, the plaintiff served combined demands upon the Batra defendants. In a preliminary conference order dated January 23, 2020, the Supreme Court, New York County (Madden, J.), directed the Batra defendants to respond to the plaintiff's demands within 30 days of the order. Inasmuch as the 30-day period set forth in the order lapsed on February 22, 2020, a Saturday, the order obligated the Batra defendants to serve a response to the plaintiff's combined demands by the next business day thereafter, or by February 24, 2020 (see

General Construction Law § 25-a[1]). The Batra defendants did not serve their responses by that date.

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.”

Moreover, as explained by the Batra defendants’ current attorneys, their clients were originally represented by the Law Offices of Benvenuto & Slattery, which was substituted by Gordon & Silber, P.C., in early March 2020. Gordon & Silber, P.C., thereafter ceased doing business on May 1, 2020, at which point Aaronson Rappaport Feinstein & Deutsch, LLP (ARFD), was substituted for the defunct firm. According to an ARFD attorney, that firm met delays in securing the case file from their predecessors. In addition, a compliance conference that had been scheduled for May 14, 2020 was adjourned without a date.

On August 11, 2020, the plaintiff made the instant motion. In their opposition papers, served and filed on August 20, 2020, the Batra defendants served their response to the

plaintiff's outstanding combined demands. The instant motion consequently was adjourned until August 27, 2020, and then again until September 3, 2020.

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]).

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, however, failed to establish that the Batra 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 Batra 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 delay here was not significant and, in any event, was attributable both to the vagaries of the COVID-19 pandemic and the turnovers of the Batra defendants' attorneys.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

3/2/2021
DATE



JOHN J. FELLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE