

Horn v Ashina

2021 NY Slip Op 30988(U)

March 29, 2021

Supreme Court, New York County

Docket Number: 152267/2018

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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ALISA HORN,
Plaintiff,

- v -

SAIT ASHINA, M.D., and MT. SINAI HEALTH SYSTEMS, INC.,
Defendants.

INDEX NO. 152267/2018
MOTION DATE 02/08/2021
MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, and 146 (Motion 005)

were read on this motion to/for COMPEL DISCOVERY/IMPOSE DISCOVERY SANCTIONS/CROSS MOTION TO COMPEL DISCOVERY/IMPOSE DISCOVERY SANCTION

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3124 and 3126 to compel the defendants to respond to outstanding discovery demands or, in the alternative, either to impose monetary sanctions upon them or strike their answer for their alleged failure to comply with discovery requests and orders, and thereupon to assess damages. The defendants oppose the motion, and cross-move, in effect, pursuant to CPLR 3042, 3124, and 3126 to compel the plaintiff to respond to their outstanding discovery demands or, in the alternative, either to dismiss the complaint or preclude the plaintiff from offering evidence in support of her claims at trial. In addition, the defendants request the court to impose costs pursuant to 22 NYCRR 130-1.1 on the ground that the plaintiff's motion is frivolous. The plaintiff opposes the cross motion. The plaintiff's motion is granted to the extent that the defendants must provide any and all outstanding discovery within 30 days of the entry of this order and submit to depositions by the dates provided for herein, and the motion is otherwise denied. The defendants' cross motion is granted to the extent that the plaintiff must

provide any and all outstanding discovery within 30 days of her receipt of notification of the specific authorizations and documents that the defendants have yet to obtain and submit to a deposition by the date provided for herein, and the cross motion is otherwise denied. The court directs the parties to appear for a status conference, as set forth herein.

On September 15, 2019, the plaintiff, in response to a prior demand for authorizations, served the defendants with eight authorizations permitting the defendants to obtain her medical records from Dr. Allison Fox/One Medical, Columbus Circle Imaging, Dr. Ali Weiselberg, NYU/Langone Radiology Department, Dr. Cinthi Pikni, Dr. Ilyse Haberman, Dr. Robert Erik Charlson, and Mount Sinai/Beth Israel Chelsea. In a preliminary conference order dated October 17, 2019, the Supreme Court, New York County (Madden, J.), directed the defendants to furnish its medical records within 30 days of that order. The order also scheduled the plaintiff's deposition for on or before February 14, 2020, and the deposition of the defendant Sait Ashina, M.D., for on or before March 10, 2020. In a subsequent status conference order dated March 12, 2020, the court (Madden, J.), compelled the defendants to resend copies of Mt. Sinai medical charts within 7 days of the order and Ashina's office records, if applicable, within 30 days of the order. The order further specified that the defendants' failure to comply "may result in sanctions including preclusionary (or waiver) language in a subsequent court order." On January 14, 2020, the defendants responded to the plaintiff's First Request for Production of Documents.

On March 17, 2020, however, the court was closed down due to the COVID-19 pandemic, by which date the parties had yet to conduct any of the additional discovery directed in the October 17, 2019 order. On March 22, 2020, the courts suspended filings in all actions. On March 29, 2020, the plaintiff served an additional authorization upon the defendants, permitting them to obtain her medical records from NYU Langone Hospital. 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. On May 19, 2020, the plaintiff served discovery documents via Dropbox, and provided the defendants, via email, with additional HIPAA-compliant authorizations permitting them to obtain her NYU Hospital records. On June 1, 2020, the defendants updated their discovery responses and provided, via regular mail and the ShareSync document-sharing application, the office records of Mount Sinai/Beth Israel and those of Ashina that had been generated at NYU.

In-person filings with the court 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.”

During the last months of 2020, the parties exchanged numerous email messages attempting to settle the action to save the time and expenses of conducting depositions. In fact, the plaintiff did not serve a notice of deposition upon Ashina until December 7, 2020. The parties continued to exchange emails concerning the scheduling of all parties’ depositions.

On January 27, 2021, the action was reassigned to this court.

The plaintiff made the instant motion on February 8, 2021, seeking the imposition of sanctions for, among other things, the defendants’ delay in producing Ashina for a deposition. The defendant submitted its cross motion papers on February 18, 2021. The defendants, in contending that the plaintiff was delinquent in providing document discovery, seemed to suggest that they either never received or could not access the documents provided via Dropbox. They

further asserted that the plaintiff had failed to provide them with all of the authorizations that they had previously requested. Both the plaintiff and the defendants allege that their adversaries were responsible for the delay in conducting and completing discovery, including depositions.

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, however, failed to establish that the defendants’ conduct during the course of 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, there were two court orders in effect directing discovery. After the issuance of both orders, the defendants provided discovery responses to the plaintiff, and a review of those submissions warrant the conclusion that they attempted in good faith to comply with the orders. The 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]).

Similarly, the plaintiff established that, on September 15, 2019, March 29, 2020, and May 19, 2020, she had served authorizations permitting the defendants to obtain her medical records from all of the health-care providers identified by the defendants in their demands. The defendants, in their cross motion papers, have not identified any particular health-care provider with respect to whom the plaintiff has failed or refused to provide an authorization. The plaintiff also established that she complied with her discovery obligations by transmitting certain voluminous documents via Dropbox, and the defendants have not shown that they made reasonable attempts to rectify any problems that they may have encountered in attempting to access the documents from that computer application.

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 attributable to the vagaries of the COVID-19 pandemic. Hence, there is no basis for the imposition of discovery sanctions upon any party.

Nonetheless, CPLR 3124 provides that

“If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

It is thus appropriate for the court to fix a firm deadline for the deposition of the parties and any nonparties with relevant information (see CPLR 3124). Hence, those branches of the plaintiff's motion and the defendants' cross motion seeking to compel that disclosure is granted (see *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963-964 [2d Dept 2015]; *Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1080 [2d Dept 2012]).

There is no basis upon which to conclude that the plaintiff's motion is frivolous within the meaning of 22 NYCRR part 130.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that

- (a) the deposition of the defendant Sait Ashina, M.D., shall be conducted on or before June 4, 2021, and the deposition of a witness on behalf of the defendant Mt. Sinai Health Systems, Inc., shall be conducted on or before June 25, 2021, with the plaintiff designating that witness on or before June 7, 2021, and
- (b) within 30 days of the entry of this order, the defendants must produce any and all outstanding written discovery responses, or provide a *Jackson* affidavit (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]) attesting that they have no such documents or cannot find documents related to the subject demands after a diligent search,

and the plaintiff's motion is otherwise denied; and it is further,

ORDERED that the defendants' cross motion is granted to the extent that

- (a) the plaintiff's deposition shall be conducted on or before May 14, 2021, and
- (b) upon the defendants' notification of the plaintiff that they were unable to access the documents previously provided to them via Dropbox, which shall be made within 15 days of the entry of this order, the plaintiff shall provide those documents within 30 days of receipt of said notification via hard copy, USB thumb drive, or as a PDF attachment to an email or emails, and
- (c) upon the defendants' notification of the plaintiff that the plaintiff has yet to provide authorizations permitting them to obtain her medical records from specifically identified health-care providers other than the providers previously identified in this order, which shall be made within 15 days of the entry of this order, the plaintiff shall,

within 30 days of the receipt of said notification, provide the defendants with HIPAA-compliant authorizations responsive thereto,

and the defendants' cross motion is otherwise denied; and it is further,

ORDERED that any party's failure to comply with this order may result in the imposition of sanctions, including preclusion of evidence at trial or the striking of a pleading; and it is further,

ORDERED that the parties shall appear remotely for a status conference on July 1, 2021, at 10:15 a.m., and the court shall send an e-mail invitation to counsel for all parties to participate in said conference via the Microsoft Teams application, at which conference a new note of issue filing deadline will be established.

This constitutes the Decision and Order of the court.

3/29/2021

DATE


JOHN J. KELLEY, J.S.C.

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