SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**

Justice

CLAUDIA WEBBER,

Plaintiff,

- against-

MT. SINAI BETH ISRAEL HOSPITAL and DAVID VANDAME, as executor of the Estate of GARY P. THOMAS, M.D.,

Defendants.

INDEX NO. 452112/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

Decision and Order

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..
Answer — Affidavits — Exhibits
Replying Affidavits

On April 15, 2021, a preliminary conference was held remotely.

Wherefore it is hereby

ORDERED that motion sequence 1 is denied; and it is further

ORDERED that outstanding authorizations shall be provided within one week; and it is further

ORDERED that Plaintiff shall provide Medicare and Medicaid authorizations within one week; and it is further

ORDERED that Plaintiff shall provide lien information within one week; and it is further

ORDERED that Plaintiff shall provide a Bill of Particulars specific to each defendant within one week; and it is further

ORDERED that Plaintiff's first deposition shall be held on or before June 15, 2021; and it is further

ORDERED that the Note of Issue shall be filed on or before April 16, 2022; and it is further

ORDERED that a compliance conference is scheduled for June 28, 2021 at 10:30 am.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 15, 2021

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Defendant Beth Israel Medical Center s/h/a "Mt. Sinai Beth Israel Hospital" ("BIMC") moves for an Order dismissing this action with prejudice for Plaintiff Claudia Webber's ("Plaintiff") willful refusal to provide outstanding and necessary discovery as demanded pursuant to CPLR §3126 and §3124; or compelling Plaintiff to provide the outstanding and necessary discovery pursuant to CPLR §3124. Plaintiff opposes.

Factual Background

This is an action for medical malpractice. Plaintiff filed the Summons and Verified Complaint on September 15, 2019 in Kings County Supreme Court against Defendants BIMC and Gary P. Thomas, M.D. ("Dr. Thomas") (collectively, "Defendants").

On October 31, 2019, BIMC joined issue and served initial discovery demands, including Demands for a Bill of Particulars, Demands for a List of Attorneys, Notices to Produce Authorizations, CPLR §4545 Demands, Requests for Identity of Witnesses and Notices to Produce, Demands for Expert Witness Disclosure, Demands for Party Statements, Demands for Photographs, Videos, and Audiotapes, Notices to Produce Medicare/Medicaid Lien Information, and Demand for Social Networking Information. On December 13, 2019, Plaintiff's counsel was served a good faith letter demanding outstanding discovery.

BIMC asserts that shortly thereafter, it became aware that Dr. Thomas died on February 24, 2019, prior to the filing of the Summons and Verified Complaint. On February 13, 2020, BIMC filed a motion seeking to change venue from Kings County Supreme Court to New York County Supreme Court on grounds that Dr. Thomas could not have maintained a place of business at the time the lawsuit was commenced and therefore, venue in Kings County was improper.

Justice Ellen M. Spodek granted BIMC's motion and granted Plaintiff's application to amend the caption to replace Dr. Thomas with "DAVID VANDAME, as Executor of the Estate of GARY P. THOMAS" (hereinafter "Mr. VanDame"). Justice Spodek further ordered that Plaintiff may serve the Summons and Complaint reflecting the amended caption on Mr. VanDame.

BIMC asserts that by July 8, 2020, it still had not received the demanded discovery and another good faith letter was served. BIMC contends that:

> In October 2020, the undersigned discussed the outstanding discovery with counsel over the telephone and counsel provided his copy of his client's BIMC records as well as some subsequent treating records from non-party Pan American Pain Institute. The undersigned subsequently discovered that counsel had inadvertently provided records containing attorney client

> communications. Upon realizing this, the undersigned immediately contacted plaintiff's counsel to advise him of same and informed him that the records would be destroyed. During that communication, the undersigned also requested a HIPAA authorization for Pan American Pain Institute so that a clean and complete copy of the records could be procured. On October 23, 2020 and October 27, 2020, the undersigned emailed plaintiff's counsel to again request outstanding discovery.

On November 2, 2020, the action was transferred to New York County Supreme Court.

On December 14, 2020, BIMC sent another good faith letter to Plaintiff's counsel. BIMC asserts that Plaintiff has failed to respond to its combined initial demands.

Parties' Contentions

BIMC argues that Plaintiff has failed to provide "a Bill of Particulars or a response to BIMC's initial combined demands, including but not limited to BIMC's demand for an authorization for Dr. Thomas's records," and Plaintiff "also failed to adequately respond to BIMC's repeated good faith attempts to obtain the outstanding discovery." BIMC asserts that Plaintiff's counsel had "ample time to object to BIMC's demands and continue the prosecution of this matter." BIMC argues that Plaintiff's failure to provide discovery "has hindered BIMC ability to promptly and thoroughly assess liability, causation and damages issues, including an evaluation of the treatment provided to plaintiff by Dr. Thomas, plaintiff's current condition, and whether plaintiff's injuries are attributable to a cause different from what she alleges." BIMC asserts that "Plaintiff's counsel's continued disregard of BIMC's demands should serve as evidence of a willful and contumacious failure to disclose necessary information, warranting dismissal of the action."

In the alternative, BIMC asserts that if the Court does not dismiss the Complaint, BIMC requests that "the Court compel production of the outstanding discovery by a date certain no more than fourteen days after the issuance of an Order deciding this motion, and that such Order be self-executing and automatically preclude plaintiff's counsel from offering at trial testimony and evidence as to the items of which particulars have not been provided if he fails to comply with the Order."

In opposition, Plaintiff asserts that no preliminary conference has been held. Plaintiff argues that Mr. Vandame "could not be served and the summons and complaint bearing the new, New York County caption and index number, is presently out for service upon the Clerk of the Surrogate's Court, in default of which plaintiff will request service of process instructions from this Court." Furthermore, Plaintiff contends that "each and all of the defendants' discovery demands have been answered, authorizations have been provided, and a proliferation of evidentiary materials not requested has also been provided in exhibits attached hereto." Plaintiff argues that "[t]his defendant has not been prejudiced by the passage of time as substantially all the information relative to the operative procedure is in its possession and the various medical professions that assisted in the operation are in its employ and control."

In reply, BIMC argues that Plaintiff's responses to BIMC's discovery demands are insufficient. BIMC asserts that:

> plaintiff's Bill of Particulars as to BIMC includes boilerplate and non-specific allegations unsuitable for a Bill of Particulars. For example, plaintiff's counsel improperly alleges that BIMC was "otherwise negligent, careless and reckless in the premises" and fails to particularize the specific allegations of this claim. Counsel alleges that BIMC employees improperly carried out Dr. Thomas's instructions "relevant to . . . conduct[ing] the tests to verify proposed placement of the spinal stimulators" but fails to identify the specific BIMC employees he is referring to, the specific instructions said employees failed to carry out, or the specific tests plaintiff claims were improperly done or, in the alternative, those that should have been done to verify spinal stimulator placement. Counsel fails to explicitly identify what imaging, aside from x-rays, BIMC failed to conduct or failed to properly interpret during and after the procedure.

BIMC asserts that "Plaintiff's response to BIMC's demands for authorizations is also insufficient." BIMC contends that on October 30, 2019, served Plaintiff demands "for various authorizations, including authorizations for relevant records of hospitals and physicians from whom plaintiff received care and treatment at the time of the alleged malpractice as well as treatment rendered before and after the alleged negligence and malpractice, materials necessary to obtain plaintiff's income

tax records for five years prior to and all years subsequent to the date of alleged malpractice, and HIPAA authorizations for any and all records referable to plaintiff maintained by collateral sources and health care cost payors and reimbursors." BIMC asserts that it followed up with Plaintiff's counsel for "HIPAA authorizations for records from codefendant Dr. Thomas's former office, collateral sources, including Medicare and Medicaid, and subsequent treating provider Pan American Pain Institute." BIMC argues that Plaintiff only provides HIPAA authorizations for Dr. Thomas' former office, Neil Weisman, M.D., South Bay Cardiovascular, and Pan American Pain Institute as exhibits to her papers.

BIMC argues that Plaintiff placed her medical condition, before and after the May 30, 2017 surgery, at issue by filing this action. BIMC asserts that plaintiff states in her Bill of Particulars, that when she first interacted with Dr. Thomas, she was suffering from "unremitting back pain in her cervical, thoracic and lumbar spine for which she could find no pain relief other than overmedicating with opioid drugs and other controlled substances" and that she "had a long history of treatment for back ailments prior to the subject matter operative procedure and had been treated without success at various medical facilities and by various medical doctors." BIMC further asserts that "Plaintiff also claims that when she first began treating with defendants, she already suffered from numerous spine conditions including but not limited to scoliosis, radiculopathy, compression fractures of discs, herniated discs and other inflammatory spinal conditions, cardiac arrhythmia, anxiety, neurosis and the residue of pain from several fractures to her anatomy, including her knee. BIMC contends that "Plaintiff claims that the subject May 30, 2017 spinal cord stimulator implant procedure dramatically increased her cervical, thoracic, and lumbar spinal pain and that she must rely on and regularly intake opioid medications for functionality." BIMC argues that it is "entitled to plaintiff's records and films from prior, subsequent, and concurrent treatment providers, especially in light of her history of back injuries, orthopedic treatment, and pain management treatment" and it "is also entitled to plaintiff's pharmaceutical records, which she claims she must take to alleviate back pain."

Moreover, "BIMC also objects to plaintiff's responses to its CPLR §4545 Demands and Notices to Produce Medicare/Medicaid Lien Information." BIMC argues that "Plaintiff's Bill of Particulars indicates that she was covered by 'independent medical insurance' as well as Medicare and counsel's response to BIMC's CPLR §4545 Demands indicates that there a Medicare lien applicable to this matter." BIMC asserts that the Bill of Particulars indicate that there will be a claim for impairment of earning capacity and loss of future earnings. BIMC contends that Plaintiff's counsel has not provided authorization for employment records, disability records or tax records.

Legal Standards

CPLR § 3101(a) generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR § 3101[a]. The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." *Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968].

"A trial court is vested with broad discretion in its supervision of disclosure." (*MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014].) "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: a party." (CPLR 3101 [a] [1].) The words "material and necessary" . . . must be interpreted 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." *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]. "The test is one of usefulness and reason." *Id.* at 407. However, discovery demands for 'any and all' information may be overbroad and inappropriate. *see Kantor v. Kaye*, NYS2d 42, 43 [1st Dept 1985].

A party "cannot produce that which it does not possess and over which it has no control." *Samello v. Intershoe Inc.*, 78 AD2d 796 [1st Dept 1980]. Similarly, "a party may not be compelled to produce information that does not exist." *Romeo v. City of New York*, 261 AD2d 379, 380 [1st Dept 1999]. However, "names of witnesses should be disclosed if their testimony may be necessary to establish what occurred, and the party seeking disclosure . . . is unable, with due diligence, to obtain such information." *Majchrzak v. Hagerty*, 268 NYS2d 937, 939 [1st Dept 1966].

"It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.,* 60 N.Y.2d 452, 456–457 [1983] [citations and footnote omitted]. "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's

claim." *Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 [1989]. "[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition." *Matter of Farrow v. Allen,* 194 A.D.2d 40, 45–46 [1st Dept 1993]. "However, it is equally well-settled that '[t]he waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments.'" *McLeod v. Metro. Transp. Auth.*, 47 Misc. 3d 1219(A), 17 N.Y.S.3d 383 [N.Y. Sup. Ct. 2015] (citing *Barnes v. Habuda*, 118 A.D. 3d 1443, 1444 [4th Dept 2014].

CPLR § 3126 provides,

> If any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed ... the court may make such orders with regards to the failure or refusal as are just, among them: ...
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of territory ... or from using certain witnesses: or
>
> 3. an order striking out pleadings or parts thereof . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

"CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party's pleadings or outright dismissal of the action." *Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 [1st Dept 1998]. "However ... the extreme sanction of dismissal is warranted only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith." *Id*. A "plaintiff's pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct ..." *Jackson v. OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017]. Although Plaintiff may "tender a reasonable excuse to overcome defendants' showing of willfulness" *Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017], "failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of

willful and contumacious conduct that warrant[s] the striking of the answer." *Turk Eximbank-Export Credit Bank of Turkey v. Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011].