

**Lattimer v Liu**

2021 NY Slip Op 31905(U)

May 26, 2021

Supreme Court, New York County

Docket Number: 805346/2019

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

LISA LATTIMER and JASON LATTIMER,

Plaintiff,

- v -

CHRISTINA LIU, TURANDOT SAUL, and MOUNT SINAI  
WEST/MOUNT SINAI HEALTH SYSTEM,

Defendant.

-----X

INDEX NO. 805346/2019

MOTION DATE 02/09/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3126 to dismiss the complaint for the plaintiff's failure to respond to their discovery demands or, alternatively, to preclude the plaintiffs from introducing any evidence or testimony at trial for which particulars have been demanded or conditionally preclude the plaintiffs from adducing evidence at trial if they do not provide the requested disclosure by a date certain. In the alternative, the defendants move pursuant to CPLR 3124 to compel the plaintiffs to comply with the outstanding discovery demands by a date certain. The plaintiffs oppose the motion, asserting that they have provided all requested information available to them and will supplement the discovery demands as additional information becomes available. This motion is granted to the extent that the plaintiffs are directed further to supplement their bill of particulars as to demands 32 and 33, in accordance with the schedule set forth herein, and to provide the defendants with employment records and tax records, as set forth herein. All other requests for relief are denied.

On or about August 23, 2019, the plaintiff Lisa Lattimer (hereinafter the patient) received emergency medical care for a knee laceration at the defendant St. Luke's Roosevelt Hospital Center/Mount Sinai West from the defendants Christina Liu, M.D. and Turandot Saul, M.D. The plaintiffs allege that the defendants failed properly to evaluate and treat the patient's laceration, causing a joint infection. The parties appeared at a preliminary conference on March 10, 2020, after which a preliminary conference order (Shulman, J.) was issued. On March 17, 2020, the court was closed 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."

Following the March 10, 2020 preliminary conference, the defendants sent the plaintiffs four letters requesting outstanding discovery from the March 10, 2020 preliminary conference, respectively dated April 22, 2020, May 28, 2020, June 2, 2020, and July 23, 2020, several of which were sent when the courts and most business in New York remained shuttered. The defendants allege that, as of January 22, 2021, when they served their reply to the plaintiffs' opposition to this motion, the plaintiffs had yet to provide employment records and tax returns as

set forth in the March 10, 2020 preliminary conference order, and had failed properly to supplement their bill of particulars with respect to items 24, 32, and 33.

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 his or her 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 defendants, however, failed to establish that the plaintiffs’ 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 was only one court order in effect directing discovery, and the COVID-19 pandemic caused unavoidable delays in responding to discovery requests for several months after that order was issued. In any event, after the issuance of that order, the plaintiffs served a supplemental bill of particulars upon the defendants, and a review of that bill warrants the conclusion that the plaintiffs attempted in good faith to comply with the order. The plaintiffs’ 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]).

In fact, the parties to this action have been able to complete a substantial portion of discovery, despite the challenges of the ongoing COVID-19 pandemic. It thus would be inappropriate at this juncture to grant the defendants' request to impose a sanction pursuant to CPLR 3126, whether the sanction sought is dismissal, preclusion, or a conditional order of preclusion. The parties agree that only three items of discovery remain outstanding and potentially in dispute. Specifically, the defendants have demonstrated that the plaintiffs failed to provide the requested employment records and tax returns, and that the plaintiffs did not provide a sufficient supplemental bill of particulars. The defendants, however, simply have not shown that the plaintiffs' failure to provide these three items of discovery was willful or contumacious.

Inasmuch as the plaintiffs have yet to produce employment records or authorizations therefor, or copies of tax returns, they shall, on or before July 15, 2021, provide the defendants with any of the patient's employment records currently in her possession that are referable to her employment from 2013 to 2015 and records, if any, referable to any employment that she obtained after December 2020 or, if none, an affidavit stating that she has no such records in her possession. By that date, the plaintiffs shall also provide the defendants with authorizations permitting them to obtain the patient's employment records from 2013 to 2015 and, if applicable, from December 2020 until present.

The court notes that, as explained on the Internal Revenue Service's (IRS's) web site, on July 1, 2019, the IRS eliminated the third-party mailing option from Form 4506 (Request for Copy of Tax Return), Form 4506-T, (Request for Transcript of Tax Return), and Form 4506-EZ (Short Form Request for Individual Tax Return Transcript). Both the IRS and the Treasury Inspector General for Tax Administration determined that the mail option presented a risk to sensitive taxpayer information. Hence, as of that date, upon a request by a taxpayer, tax

returns and transcripts will be mailed only to the taxpayer's address of record. IRS Form 13873-R now includes a check-off box that informs a third-party addressee that it will not process any request to send it returns and transcripts, and cannot provide the reasons for its determination not to process the request (*see generally* 26 CFR 601.702[d][1], 26 CFR 301.9000-1-301.9000-6). Consequently, the court directs that, on or before July 15, 2021, the plaintiffs shall submit the necessary forms to the IRS to obtain their tax returns for the years 2013 through 2020 and shall produce them to the defendants immediately upon the plaintiffs' receipt thereof.

In addition, the defendants allege that, even though the plaintiffs served a supplemental bill of particulars on December 11, 2020, the supplemental bill of particulars remains insufficient. The defendants identify alleged deficiencies in connection with the plaintiffs' responses to items 24, 32, and 33 in the initial demand for a bill of particulars.

"Under CPLR 3042(d), a court may invoke the relief set forth in CPLR 3126 when a 'party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule.' CPLR 3126, in turn, governs discovery penalties and applies where a party 'refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.' The statute contains a list of nonexclusive sanctions and further permits courts to fashion orders 'as are just.' CPLR 3126 therefore broadly empowers a trial court to craft a conditional order--an order 'that grants the motion and imposes the sanction 'unless' within a specified time the resisting party submits to the disclosure' (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:10 ['The conditional order is in fact the most popular disposition under CPLR 3126']; *see also* CPLR 3042[d])"

(*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010]). Nonetheless, such a sanction is inappropriate in the instant matter, as the plaintiffs attempted to supplement their bill of particulars, as requested by the defendants; the fact that a party serves discovery materials during the pendency of a CPLR 3126 motion to strike his or her pleading does not render the party's prior failure to make discovery willful or contumacious and, hence, does not make it subject to the imposition of a sanction (*see Chamberlain, D'Amada, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; *see also Butler v Knights Collision Experts, Inc.*, 165 AD3d at 407; *Marks v Vigo*, 303 AD2d 306, 307 [1st Dept 2003]). "[A]ny mere lack of

diligence in furnishing certain requested materials is not a ground for dismissal” or other sanction (*Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 539 [1st Dept 2017]; see *Marks v Vigo*, 303 AD2d at 307; *Bueno v 562 W. 174th St. Equities, LLC*, 2020 NY Slip Op 30223[U], 2020 NY Misc LEXIS 374 [Sup Ct, N.Y. County, Jan. 28, 2020 [Kelley, J.]).

In any event, the supplemental bill of particulars was sufficient as to demand 24, and, as to demands 32 and 33, the court directs the plaintiffs, pursuant to CPLR 3124 and 3043(c) further to supplement their bill of particulars as set forth below.

Item 24 in the defendants’ demand for a bill of particulars requested that, “[i]f loss of earnings is claimed as a result of the alleged negligence,” the plaintiffs must set forth the name and address of the patient’s employer at the time of the alleged negligence, the capacity in which the patient was employed, her earnings for the year prior to the alleged negligence, the last date that she worked prior to the alleged negligence, the name and address of her present employer, and the loss of earnings claimed. In their initial bill of particulars, the plaintiffs allege that the patient was not employed at the time of the alleged negligence, she was thus not employed in any capacity, she had no earnings during the year prior to the alleged negligence, she had last worked in 2015, she was not employed at the time she served the initial bill of particulars, and that she was claiming an amount of not less than \$1 million dollars in lost earnings, which a reasonable person could infer was referable to future lost earnings. In their supplemental bill of particulars, the plaintiffs allege that the “Bill of Particulars responses are accurate. Plaintiff alleges that her future plan to enter the workforce has been hampered by these injuries.” The court concludes that this constitutes a complete response to Item 24.

Item 32 in the defendants’ demand for a bill of particulars requested that, if the plaintiffs intend to pursue a cause of action alleging lack of informed consent, they identify that aspect of the defendants’ treatment which it will be claimed exposed the patient to material risks that required disclosure, each risk or danger of treatment that the plaintiffs would claim should have been, but was not, disclosed, in what manner the defendants’ disclosure was inadequate, what

course of treatment the patient would have chosen if the defendants reasonably disclosed the material risks of the treatment actually rendered, what alternative choices were available that could have been administered but were not, that date on which the defendants should have obtained informed consent, and the name and corresponding position with the institutional defendants of each and every employee or agent alleged to have failed to obtain informed consent. In their supplemental bill of particulars, the plaintiffs responded that, “[s]ubject to deposition testimony, which should reveal if applicable procedures were performed, plaintiff will either supplement or withdraw her claim for lack of informed consent.” Although this response does not directly answer the defendants’ inquiries, depositions have yet to be conducted and, frequently, the particulars of a medical malpractice or lack of informed consent claim cannot be articulated until depositions have been completed (*see Iskhakova v Abayev*, 2020 NY Slip Op 33948[U] [Sup Ct, Queens County, Oct. 8, 2020]). Hence, the plaintiff is directed either to provide such supplemental particulars within 30 days of the completion of the last deposition of the defendants or to withdraw the lack of informed consent claim by that date (*see id.*)

Item 33 in the defendants’ demand for a bill of particulars requests the plaintiffs to identify the relationship of the person claiming loss of services to the patient and, if the claimant is the spouse of the patient, the date and place of marriage. It also requests the plaintiffs to identify the nature of the services previously provided that the patient is no longer able to provide as a result of defendants’ alleged negligence, the frequency with which each such service was previously provided to the claimant by the patient, and whether the claimant has incurred any expenses in replacing the services previously provided by the patient and, if so, the amount of such expenses. In response, the plaintiffs stated as follows: “May 19, 2001, Appleton, WI and to be further supplemented.” Presumably, the plaintiffs are alleging that the person claiming loss of the patient’s services was the patient’s spouse, and that they were married on that date and in that location. The plaintiffs, however, did not attempt to answer the

remainder of the inquiries set forth in Item 33. They are required to do so and are directed to provide particulars as to Item 33(b), (c), and (d) on or before July 15, 2021.

Accordingly, it is

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

on or before July 15, 2021, the plaintiffs shall provide the defendants with any employment records of the plaintiff Lisa Lattimer that are currently in her possession referable to her employment from 2013 to 2015, and records, if any, referable to any employment that she obtained after December 2020 or, if none, an affidavit stating that she has no such records in her possession,

on or before July 15, 2021, the plaintiffs shall provide the defendants with authorizations permitting them to obtain the employment records of the plaintiff Lisa Lattimer referable to her employment from 2013 to 2015 and records referable to any employment that she obtained after December 2020, if applicable,

on or before July 15, 2021, the plaintiffs shall submit the appropriate forms to the Internal Revenue Service permitting them to obtain their own tax returns for the years 2013 through 2020 and shall, upon receiving copies of any such returns, provide them to the defendants forthwith,

within 30 days after the completion of the last deposition of the defendants, the plaintiffs either shall further supplement their bill of particulars as to demand number 32, or withdraw their claim to recover for lack of informed consent, and

on or before July 15, 2021, the plaintiffs shall further supplement their bill of particulars as to demand numbers 33(b), (c), and (d),

and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

5/26/2021  
DATE

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