

Gopstein v Vad

2021 NY Slip Op 32463(U)

August 26, 2021

Supreme Court, New York County

Docket Number: Index No. 805001/2019

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN KELLEY PART 56M

Justice

-----X

SHELDON GOPSTEIN

Plaintiff,

- v -

VIJAY B. VAD, M.D.,

Defendant.

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INDEX NO. 805001/2019

MOTION DATE 06/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 were read on this motion to/for DISMISS ACTION/CPLR 3126

In this action to recover damages for medical malpractice, the defendant moves pursuant to CPLR 3126 to dismiss the complaint or impose alternative sanctions upon the plaintiff for failure to comply with disclosure requests and discovery orders. The plaintiff opposes the motion. The motion is denied.

This action, in which the plaintiff contends that he sustained injuries to his right leg, thigh, foot, ankle, shin, and medial calf, was initially assigned to Justice Joan Madden. Justice Madden issued a preliminary conference order on June 6, 2019, a compliance conference order on September 12, 2019, and status conference orders on December 5, 2019, January 19, 2020, and January 30, 2020. On March 17, 2020, the courts were closed due to the COVID-19 pandemic, and did not reopen until June 10, 2020, and then only for court personnel. Filings in electronically filed actions were suspended from March 22, 2020 until May 5, 2020. All deadlines for service and filing of papers in civil actions were tolled from March 20, 2020 until November 3, 2020.

The defendant made the instant motion on June 12, 2020. In his motion, the defendant asserted that, after sending the plaintiff numerous good faith letters requesting authorizations for IRS and wage records, the plaintiff, on December 10, 2019, advised the defendant that he was withdrawing any claim for lost wages. The defendant also asserted that, even after the entry of the January 30, 2020 status conference order, and his transmission of numerous good faith letters to the plaintiff, the plaintiff had yet to provide authorizations permitting the defendant to obtain certain medical and other health-care records, as well as lien and insurance information, that the plaintiff had been directed to provide in the several case management orders.

In opposition to the defendant's motion, the plaintiff submitted his April 4, 2019 response to the defendant's combined demand and copies of authorizations dated April 3, 2019, permitting the defendant to obtain his IRS, Medicare, Medicaid, Social Security, and private health insurance records. He also submitted a letter from his attorney to the defendant's attorney dated January 27, 2020, annexing new or updated authorizations permitting the defendant to obtain medical records from 33 health-care providers, as well as records from the health club to which he belonged. The letter explained that the plaintiff had already provided authorizations with respect to one additional health-care provider. In the letter, the plaintiff either objected to, or reiterated objections to, requests to provide the defendant with authorizations for certain named health-care providers or categories of health-care providers whose treatments or examinations were completely irrelevant to the injuries claimed in this action, including a urologist, a dermatologist, psychiatrists who prescribed antidepressants, otolaryngologists, otologists, hearing specialists, endocrinologists, ophthalmologists, optometrists, retinologists, eye care professionals, cardiologists, and oncologists.

The plaintiff also submitted, with his opposition to the motion, a copy of a transmittal letter dated March 17, 2020, that, notwithstanding the plaintiff's earlier objections, forwarded authorizations permitting the defendant to obtain medical records from four additional health-care providers, including two urologists and two dermatologists. It also explained that the

plaintiff had, on February 5, 2020, previously provided authorizations permitting the defendant to obtain records from two psychiatrists who had treated the plaintiff. In the March 17, 2020 letter, the plaintiff explained that he had no lien information in his possession and that, inasmuch as he had previously withdrawn any claim for lost wages, he objected to providing additional IRS authorizations. In addition, the plaintiff submitted a transmittal letter from his attorney to the defendant's attorney dated April 28, 2020, pursuant to which his attorney forwarded the defendant's attorney authorizations permitting the defendant to obtain records from 17 separate health-care providers and *Arons* authorizations (*Arons v Jutkowitz*, 9 NY3d 393 [2007]) permitting the defendant to obtain records from and speak with 9 separate health-care providers.

The motion was initially made returnable on July 13, 2020. As of December 31, 2020, when Justice Madden retired, the motion had yet to be determined. The action was reassigned to this court on March 9, 2021.

CPLR 3101 (a) calls for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407[[1968] [internal quotation marks omitted]). Evidence is material if sought "in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination" (*id.*). Material such as information obtained by a medical doctor in connection with the treatment of a patient, however, is generally privileged (see CPLR 4504[a]; 3101 [b]; *Dillenbeck v Hess*, 73 NY2d 278, 284 [1989]; *Keith v Forest Labs., Inc.*, 72 AD3d 519, 520 [1st Dept 2010]; *Kaplowitz v Borden, Inc.*, 189 AD2d 90, 92 [1st Dept 1993]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70-71 [2d Dept 1992]). Thus, a litigant seeking discovery of such records has the burden of demonstrating that the party has waived the privilege by putting his or her condition in controversy (*Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]; *Keith v Forest Labs., Inc.*, 72 AD3d at 520; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d at 71; see also *Velez v Daar*, 41

AD3d 164, 165 [1st Dept 2007]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266, 267 [2d Dept 2002]).

“[A]lthough a plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his [or her] physical or mental condition is affirmatively placed in controversy . . . , the waiver of that privilege does not permit discovery of information involving unrelated illnesses and treatments”

(*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008] [internal quotation marks omitted]; see *Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]; *Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493 [1st Dept 2008]). Thus, where a plaintiff commences an action to recover for damages for orthopedic injuries, there is generally no basis to compel the release of his or her primary care records or records of medical treatments unrelated to the cause and consequences of the subject accident (see *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]).

Here, the defendant has not made the necessary showing connecting the plaintiff's treatment, if any, by numerous specialists in those medical fields as to which the plaintiff objected, with the orthopedic and neurological injuries claimed herein. Moreover, even after the plaintiff objected, the plaintiff nonetheless provided authorizations permitting the release of records generated by his urologists and dermatologists.

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 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 defendant, however, failed to establish that the plaintiff's 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, the plaintiff had almost completely complied with all outstanding discovery requests and orders, except in connection with lien information, which he asserted was not then in his possession. In any event, after the issuance of the most recent status conference order, the plaintiffs served numerous additional authorizations. The plaintiff's 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]). "[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.]]).

The court notes that, on March 17, 2021, the plaintiff informed the court that he had discharged his attorneys as of March 15, 2021. A status conference that had been scheduled for May 28, 2020 before Justice Madden was first adjourned until June 29, 2021 due to the COVID-19 pandemic. At that conference, however, the plaintiff informed the court that he had yet to be able to retain new counsel, and the court granted the plaintiff's request for an adjournment of the conference until August 26, 2021 to permit him to retain new counsel. On August 26, 2021, the court, over the defendant's objection, granted a request for a second adjournment, this time until November 4, 2021, to permit the plaintiff to retain new counsel. This adjournment will be a final adjournment, and the court directs the plaintiff to be ready to proceed

to schedule the defendant's deposition and any remaining or additional discovery on that date, whether he is represented or unrepresented.

In light of the foregoing, it is,

ORDERED that the defendant's motion is denied.

This constitutes the Decision and Order of the court.

8/26/2021

DATE


JOHN KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE