

<b>Shorenstein v Spiera</b>
2021 NY Slip Op 32468(U)
October 29, 2021
Supreme Court, New York County
Docket Number: Index No. 805320/2017
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** **56M**

*Justice*

-----X

ERIN SHORENSTEIN,

Plaintiff,

- v -

ROBERT SPIERA, PENNY TURTEL, and JODY STORCH,  
AS EXECUTORS OF THE ESTATE OF HARRY SPIERA,  
M.D. and RHEUMATOLOGY ASSOCIATES, P.C.,

Defendants.

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**INDEX NO.** 805320/2017

**MOTION DATE** 08/17/2021

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 121, 122, 129, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3124 to compel the plaintiff to provide responses to various discovery requests and orders or, in the alternative, pursuant to CPLR 3126 for the imposition of sanctions upon the plaintiff for failure to make discovery. On April 11, 2020, during the pendency of the instant motion, the defendant Harry Spiera, M.D., died, and the action was thus stayed by operation of law until a representative of his estate was substituted. By interim order dated February 8, 2021, this court memorialized the stay, and held this motion in abeyance pending the substitution of a representative of Spiera's estate as a defendant in this action. By so-ordered stipulation dated March 9, 2021, this court granted the application of the representatives of Spiera's estate to be substituted as defendants, amended the caption accordingly, and vacated the stay. This motion was further adjourned upon consent of the parties, and the plaintiff thereafter opposed the motion. The defendants' motion is granted to

the extent that, on or before December 3, 2021, the plaintiff shall provide the defendants with certain items of discovery, as set forth herein, and the motion is otherwise denied.

CPLR 3126 authorizes the court to sanction only a party who “refuses to obey an order for disclosure or *wilfully fails* to disclose information which the court finds ought to have been disclosed” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis added]). A party’s failure to satisfy his or her discovery obligations, particularly after a series of court orders 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 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]).

Although, at the time that this motion was made, there were several court orders in effect that set forth a schedule for discovery, the plaintiff’s conduct did 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 *Palmenta v Columbia Univ.*, 266 AD2d at 91 [noncompliance with one discovery order is not willful and contumacious conduct]; see also *Brigham v Jaffe*, 189 AD3d 475, 475-476 [1st Dept 2020];- *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]; *Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015] [party’s failure to comply with three discovery orders was not willful and contumacious where that party evinced willingness to provide outstanding discovery]). Moreover, the plaintiff’s obligation to serve responses to discovery demands and comply with the deadlines set forth in the outstanding discovery orders was tolled from March 20, 2020, a date only eight days after the initial return date of this motion, until November 3, 2020 (see L

2020, ch 23, § 2; Executive Law § 29-a; Executive Order 202.8, Executive Order 202.67; see *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]).

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 plaintiff to provide outstanding items of discovery (see CPLR 3124; *Willam 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]). Hence, that branch of the defendants' motion seeking to compel that disclosure is granted to the extent that, on or before December 3, 2021, the plaintiff shall provide the defendants with the following items of discovery, insofar as she has yet to produce them:

- (a) authorizations permitting them to obtain the plaintiff's employment records from Paul Weiss Rifkind Wharton & Garrison, LLP, and Proskauer Rose, LLC;
- (b) copies of the plaintiff's complete and unredacted tax returns for the years 2012 to 2020;
- (c) lien information;
- (d) proof of the plaintiff's claimed expenses and lost income, including receipts for each and every expense claimed, which shall transportation-related expenses;
- (e) authorizations permitting the defendants to obtain insurance records from Klais and Company, Inc., Cigna, First Unum Life Insurance Company, and Empire Blue Cross/Blue Shield;
- (f) authorizations permitting the defendants to obtain the plaintiff's medical records from Steven C. Goldstein, Jacqueline Delmont, Dr. Franks, Andre Apollo, Dr. Lockshin, and Dr. Fink, to the extent not already provided, such authorizations shall also specify that the physician must produce any CT scan, PET scan, X-ray, or MRI films or recordings;
- (g) authorizations permitting the defendants to obtain medical records from Leslie Harf, from May 4, 2019 through the present, including records related to any and all video conferences, telemedicine appointments, contacts, and emails;

- (h) authorizations permitting the defendants to obtain records from any other clinician who treated the plaintiff between March 1, 2020 and the present, including records related to video conferences, telemedicine appointments, and contacts;
- (i) any records in the plaintiff's possession referable to her treatment with Leslie Harf;
- (j) copies of emails in the plaintiff's possession that she exchanged with Dr. Lockshin, including emails referenced in that physician's notes concerning the plaintiff's visits on December 16, 2016 and January 29, 2016, the MRIs which Dr. Lockshin referred on December 2, 2016 and which were reviewed via email by Dr. Fink, and the X-ray reviewed by Dr. Lockshin on December 2, 2016;
- (k) proof of claim documents in the plaintiff's possession that she submitted to First Unum Life Insurance Company;
- (l) proof of continuing disability documents in the plaintiff's possession that she submitted to First Unum Life Insurance Company;
- (m) copies of all proof of claim and proof of continuing disability documents in the plaintiff's possession that were submitted by physicians on behalf of plaintiff to First Unum Life Insurance Company; and
- (n) the identity of the person described by the plaintiff at her deposition as a person with whom she discussed physical anxiety and, if that person is a health-care provider, an authorization permitting the defendants to obtain records from that person

To the extent that the documents enumerated above are not in the plaintiff's possession, or cannot be located after a diligent search, the plaintiff shall, on or before December 3, 2021, provide the defendants with a *Jackson* affidavit (see *Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]) attesting to the fact that she either is not in possession of those documents or that she could not locate them after a diligent search, and describing the nature of the search that she undertook. If the plaintiff has, in fact, already provided the particular item, she shall, on or before December 3, 2021, either provide the defendants with proof that she has already provided it, or shall provide a courtesy copy of the item to the extent that she lacks proof that she has already provided it.

The plaintiff is cautioned that her failure to comply with the terms of this order may subject her to the imposition of sanctions, including the preclusion of evidence at trial, or the dismissal of the complaint.

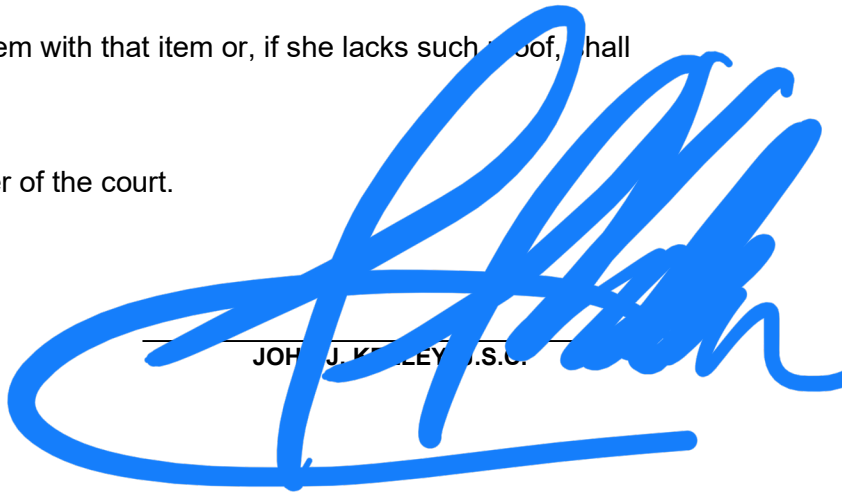
In light of the foregoing, it is

ORDERED that the defendants' motion is granted to the extent that, on or before December 3, 2021, the plaintiff shall provide the defendants with the items enumerated as items "a" through "n" above, insofar as she has not previously provided them, and/or an affidavit permitted by *Jackson v City of New York* (185 AD2d 768 [1st Dept 1992]) attesting to the fact that she either is not in possession of particular documents that were ordered to be produced, or that she could not locate them after a diligent search, and describing the nature of the search that she undertook, and the motion is otherwise denied; and it is further,

ORDERED that if the plaintiff has already produced a particular item required to be produced by this order, she shall, on or before December 3, 2021, provide the defendants either with proof that she had previously provided them with that item or, if she lacks such proof, shall produce courtesy copies of that item.

This constitutes the Decision and Order of the court.

10/29/2021  
DATE

  
JOHN J. KANE, J.S.C.

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