

Cong Yu v Rios

2021 NY Slip Op 33942(U)

October 28, 2021

Supreme Court, Queens County

Docket Number: Index No. 716181/2018

Judge: Maurice E. Muir

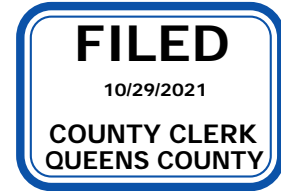
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



CONG YU and LIHUA DONG,

IAS Part - 42

Plaintiff,

Index No.: 716181/2018

-against-

Motion Date: 10/28/21

VICTOR M. RIOS AND MARIA I. RIOS-
RUIZ,

Motion Cal. No. 38

Defendants.

Motion Seq. No. 3

The following electronically filed (“EF”) documents read on this motion by Victor M. Rios (“Mr. Rios”) and Maria I. Rios-Ruiz (“Ms. Ruiz”) (collectively, the “defendants”) for an order: a) pursuant to CPLR § 3126, dismissing the plaintiffs' complaint upon the ground that they have unreasonably failed to appear for an independent medical examination (“IME”); or b) pursuant to CPLR § 3124, precluding plaintiffs from offering any evidence at the trial of this action; and c) pursuant to CPLR § 3124, compelling said examination. Moreover, Cong Yu (“Mr. Yu”) cross moves for the same relief sought by the defendants.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 31 - 41
Notice of Cross Motion-Affirmation-Exhibits-Service	EF 42

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries, which Mr. Yu and Lihua Dong (“Ms. Dong”) allegedly sustained in a motor vehicle collision. As a result, on October 23, 2018, the plaintiffs commenced the instant action against the defendants. On January 3, 2019, issue was joined, wherein the latter interposed an answer. Thereafter, on April 22, 2019, the

court issued a preliminary conference order ("PCO"), which directed the parties to conduct examinations before trial ("EBT") on or before September 10, 2019; and independent medical examinations ("IME") forty-five (45) days thereafter. Moreover, on October 16, 2019, the court issued a compliance conference order ("CCO"), which stated, in relevant part, the following:

ORDERED that all defendants and other parties desiring to take the physical examination of any plaintiff shall designate, in writing, the physician(s) to take such examination within 45 days of the completion of the deposition, or within 45 days of the date hereof in the event plaintiff's deposition has already occurred. All physical examinations shall be completed within 45 days of the designation of examining physician(s). Pursuant to 22 NYCRR S 202.17[c] copies of the reports of the examining physician(s) shall be served on all parties within 60 days after the completion of the examination. . . .

Moreover, on August 3, 2020, the Honorable Rudolph Greco issue an order, which instructed the parties to conduct IMEs on or before October 20, 2020. Now, the defendant seeks the above-described relief. The court notes on July 7, 2021, Cong Yu appeared for an IME. As a result, the court will only address Ms. Dong's non-compliance with the court's orders regarding her IME.

CPLR § 3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must 'be interpreted liberally 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'" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see also *Brito v. Gomez*, 33 NY3d 1126 [2019]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Merry Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]; *Quinones v. 9 E. 69th St., ILC*, 132 AD3d 750, 750 [2d Dept. 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept. 1989]; see *Quinones v. 9 E. 69th St., ILC*, 132 AD3d at 750, supra).

Furthermore, CPLR § 3126 permits the court to dismiss an action or to preclude a plaintiff from offering testimony or evidence, which would effectively result in dismissal, where it is determined that the plaintiff's conduct in failing to provide discovery was willful or

contumacious (see *Almonte v. Pichardo*, 105 AD3d 687 [2d Dept 2012]; *Harris v. City of New York*, 117 AD3d 790 [2d Dept 2014]; *Zubaidi v. Hasbani*, 136 AD3d 708 [2d Dept 2016]); *Patterson v. New York City Health and Hospitals Corp.*, 284 AD2d 516 [2d Dept 2001]).

“Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply, or a failure to comply with court-ordered discovery over an extended period of time” (*Rock City Sound, Inc. v. Bashian & Farber, LLP*, 83 AD3d 685, 686-687 [2d Dept 2011] [internal quotation marks and citations omitted]; *Teitelbaum v. Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016]; *Orgel v. Stewart Tit. Ins. Co.*, 91 AD3d 922 [2d Dept 2012].) Here the court finds that Ms. Dong’s conduct is willful and contumacious, which is demonstrated by her repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failure to comply, and a failure to comply with court-ordered discovery over an extended period of time. (see *Honghui Kuang v. MetLife*, 159 AD3d 878 [2d Dept 2018]).

Additionally, where the mental or physical condition of a party is in controversy, the party may be required to submit to a medical examination (see CPLR § 3121; *Dillenbeck v. Hess*, 73 NY2d 278, 287 [1989]; *Peculic v. Swicki*, 129 AD3d 930 [2d Dept 2015]; *D’Adamo v. Saint Dominic’s Home*, 87 AD3d 966 [2d Dept 2011]). Moreover, a party must provide authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting his or her physical condition in issue (see CPLR § 3121(a); 22 NYCRR § 202.17; *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Dillenbeck v. Hess*, 73 NY2d 278, 287 [1989]; *Peculic v. Swicki*, 129 AD3d 930 [2d Dept 2015]). Indeed, in order to properly defend against a plaintiff’s claims, defendant requires authorizations and records in relation to a plaintiff’s injuries as parties are entitled to discovery of information that is material and necessary to defend against claims. (see *Brito v. Gomez*, 33 NY3d 1126 [2019]). Here, Ms. Dong has placed her physical condition in controversy. As such, she has waived the physician-patient privilege, and she is required to submit to an IME. (*Peculic v. Swicki*, 129 AD3d 930 [2d Dept 2015]).

Notwithstanding the same, the court finds that Mr. Yu’s cross-motion is improper. It is well settled that a cross-motion is an improper vehicle for seeking affirmative relief from a nonmoving party. (*Mango v. Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]; see CPLR § 2215; see also *Asiedu v. Lieberman*, 142 AD3d 858, 858 [1st Dept 2016]; *Sanchez v.*

Metro Bldrs. Corp., 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v. Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Fuller v. Westchester County Health Care Corp.*, 32 AD3d 896 [2d Dept 2006]; *Terio v. Spodek*, 25 AD3d 781, 785 [2d Dept 2006]; *Gaines v. Shell-Mar Foods, Inc.*, 21AD3d986, 987-988 [2d Dept 2005]). As such, the court is compelled to deny the instant cross-motion.

Accordingly, it is hereby

ORDERED that Lihua Dong shall produce duly executed and acknowledged HIPAA compliant medical authorizations, pursuant to NYCRR 202.17(b), on or before November 30, 2021; and it is further,

ORDERED that the physical examination of Lihua Dong shall be designated by the defendant on or before November 30, 2021; and it is further,

ORDERED that the physical examination of Lihua Dong shall be conducted 60 days of designation, and the IME report(s) shall be exchanged within 45 days upon completion of the IME; and it is further,

ORDERED that if Lihua Dong fails to comply with the directives of this Order, she shall be precluded from presenting evidence and testimony at the time of trial; and it is further,

ORDERED that Cong Yu's cross-motion is denied, in its entirety; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that defendant shall serve, via certified mail and NYSCEF, a copy of this Order with Notice of Entry upon the parties on or before November 15, 2021.

The foregoing constitutes the decision and order of the court.

Dated: October 28, 2021


MAURICE E. MUIR, J.S.C.