

Feliz v Xingchen Mai
2022 NY Slip Op 30375(U)
January 26, 2022
Supreme Court, New York County
Docket Number: Index No. 805034/2017
Judge: Kathy J. King
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J.KING PART 6

Justice

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INDEX NO. 805034/2017

MARTHA FELIZ , AS ADMINISTRATOR OF THE ESTATE
OF PEDRO FELIZ,

MOTION DATE 7/24/20,3/30/21

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

XINGCHEN MAI, GINA WAIGHT, NEW YORK AND
PRESBYTERIAN HOSPITAL, MICHAEL KASSOUF M.D.,
TOTAL MEDICAL, P.C.,

DECISION & ORDER

Defendant(s)

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HON. KATHY J. KING:

In this medical malpractice action, plaintiff Martha Feliz as Administrator of the Estate of Pedro Feliz (“plaintiff”) moves for an order compelling defendants Michael Kassouf, M.D. and Total Medical P.C. (“defendants”) to complete the deposition of plaintiff’s administrator (motion sequence 002), and for an order striking defendants answer for willful and contumacious conduct in delaying discovery, failing to schedule plaintiff’s continued deposition, and refusing to enter into a proposed stipulation. The parties appeared for oral argument via Microsoft Teams on July 15, 2021, whereat plaintiff withdrew their motion to compel defendants to complete the deposition of plaintiff’s administrator (motion sequence 002). Defendants oppose the application to strike their answer (motion sequence 003), and request sanctions against plaintiff because they claim plaintiff’s motion is frivolous.

BACKGROUND

This action sounds in the alleged failure to timely diagnose and treat decedent’s foot ulcer leading to a partial amputation. Plaintiff initiated an action against defendants Xingchen Mai, M.D., Gina Therese Waight M.D., and New York Presbyterian Hospital (“co-defendants”) under this index number on January 31, 2017 and initiated an action against defendants under index number 805153/2018 on May 8, 2018. On December 5, 2018, Judge McMahon consolidated the latter index number into this action. Following this, counsel for defendants changed hands several times until defendants’ current counsel, the law firm of Furman Kornfeld & Brennan, LLP

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(“defendants’ counsel”), began representing defendants. Consent to change attorney forms were uploaded under index 805153/2018 and attached to defendants opposition.¹

Thereafter, defendants’ counsel attempted to record representation under the consolidated index number on New York State Courts Electronic Filing System (“NYSCEF”) but were unable to do so. Defendants’ counsel could not record representation because the caption on NYSCEF did not include defendants. The parties privy to the consolidation failed to notify the County Clerk and submit an EF-22 form to change the caption. After speaking with court personnel on separate occasions, defendants’ counsel learned how to effectuate the consolidation. On April 28, 2021, defendants’ counsel notified the County Clerk of the consolidation, and thereafter, recorded representation.

In the time between beginning representation and recording it, plaintiff indicated their desire to move discovery forward. Defendants, however, were prevented from proceeding with discovery and responding to motion sequence 002 because they could not record representation despite being retained. Defendants made multiple attempts during this time to communicate the issue with plaintiff and the court to obviate any motion practice. Defendants also notified plaintiff of their acquiescence to move forward with discovery in multiple correspondences to plaintiff but were precluded from doing so because the matter was not consolidated on NYSCEF. Despite those communications, plaintiff’s motion to strike defendants’ answer (motion sequence 003) followed.

ARGUMENTS

Plaintiff makes this motion to strike defendants answer because of defendants alleged willful and contumacious conduct in failing to proceed with discovery. Plaintiff argues that they have made good faith efforts to complete and schedule plaintiff’s third deposition and enter into a further discovery schedule. Plaintiff indicates that defendants have been represented by four separate defense forms and allege that this turnover is a delay tactic. Plaintiff argues that defendants excuse of not being able to record representation and unable to proceed is meritless. Plaintiff points to defendants’ prior counsel’s conduct in proceeding with discovery despite the parties not effectuating the consolidation on NYSCEF.

Defendants submitted late opposition to plaintiff’s motion. Defendants argue that because the consolidation was not effectuated, they could not record representation on NYSCEF; and therefore, could not proceed with discovery. Defendants point to plaintiff’s and co-defendant’s failure to submit the proper form to the County Clerk to consolidate the actions on NYSCEF. Defendants also claim to have had no knowledge of the consolidation until co-defendants informed them. Defendants submitted, in support, multiple correspondences about this issue to plaintiff and the court in an effort to resolve it and move forward with discovery. Based on these efforts, defendants also seek sanctions against plaintiff for this motion practice as they claim it is frivolous.

¹ Defendants’ counsel obtained a consent to change attorney form for defendant Michael Kassouf, M.D, only on October 30, 2020. It was not until a few months later a consent to change attorney form was obtained for defendant Total Medical, P.C. on January 29, 2021.

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Plaintiff replied reiterating much of the same arguments made in the motion and requests the court to disregard defendants' late opposition.

DISCUSSION

As a preliminary matter, plaintiff requests the court to disregard defendants' opposition because it is untimely. Given the procedural posture of this action, plaintiff's failure to demonstrate any prejudice, and their ability to submit reply papers, the court declines plaintiff's request and will consider defendants' opposition (*Sanchez v. Steele*, 149 AD3d 458, 458 [1st Dept 2017]).

CPLR § 3126 gives courts the discretion to impose penalties upon parties who willfully fail to comply with discovery-related directives during the course of litigation. Depositions fall within the rubric of discoverable information that a court can order. The sanction of striking a party's answer for failing to comply with discovery directives is warranted when a party repeatedly and persistently fails to comply with several orders issued by a court. (*Yoon v. Costello*, 29 AD3d 407[1st Dept. 2006]; see also *Kogan v. Royal Indemnity Co.*, 179 AD2d 399 [1st Dept. 1992][dismissal appropriate when a plaintiff repeatedly and willfully disobeys the court's successive discovery orders]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Indeed, repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct (*Goldstein v. CIBC World Markets Corp.*, 30 AD3d 217 [1st Dept. 2006]). Upon such a showing, the burden shifts to the non-moving party to provide a reasonable excuse for its non-compliance (*Reidel v. Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept. 2004]).

Here, plaintiff fails to demonstrate defendants' willful, contumacious, or bad faith conduct that would warrant defendants' answer being struck. Plaintiff points to the larger picture in that multiple law firms have represented defendants and the repeated failure to comply with discovery across all firms is sufficient to satisfy a showing of will, contumacious, or bad faith conduct. Plaintiff also asserts that defendants' latest excuse is further evidence of it and their noncompliance with the latest directive to take plaintiff's third deposition. However, after review of the record, it appears that discovery in this action has been proceeding, although slower than desired. Defendants' second law firm closed and required them to obtain new representation.² After this action was consolidated in the 2018 order, plaintiff has been deposed twice. The parties agreed to a third deposition in a March 3, 2020 stipulation, but the COVID-19 pandemic occurred that same month and inevitably changing the way the world operated. Given the impact of the pandemic, some delay was to be expected as the world adapted to a new temporary norm. Defendants' most recent firm could not record representation because the County Clerk was not notified of the consolidation. Plaintiff counters this point with the conduct of defendants' prior law firm Gordon & Silber, P.C. and how they proceeded with discovery; however, the court will not compare the ethical practice of one firm that has closed with another on this motion. It also appears that

² Gordon & Silber, P.C., defendants' second law firm, began representing defendants after the consolidation on March 14, 2019, according to the consent to change attorney form submitted. It is unclear when this representation ended and when Aaronson Rappaport Feinstein & Deutsch, LLP, defendants' third law firm, began their representation.

defendants cannot solely be blamed for the delay. In three prior discovery orders after the action was consolidated, plaintiff stipulated to provide the same discovery items related to responses to combined discovery demands and authorization.³ Moreover, plaintiff and co-defendants never effectuated the consolidation with the County Clerk, and the consolidation was not uploaded under the original index number against defendants. Defendants' counsel resolved this issue on their own and recorded their representation shortly thereafter.⁴ Defendants' counsel has shown diligence and good faith effort in attempting to move this case forward. Since beginning representation, defendants counsel has communicated the issue with plaintiff and has been willing to proceed with discovery. This motion has thwarted progress of this matter. Given the aforesaid, plaintiff's motion to strike the answer is denied.

Defendants seek sanctions against plaintiff for this motion because they claim it is frivolous. The court does not consider this request as defendants did not cross-move for this relief and only oppose plaintiff's motion (22 NYCRR 130-1.1[d] ["[a]n award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative]). The court declines to impose sanctions even on its own initiative because this motion was not entirely frivolous given the circumstances of this matter. Further, it appears plaintiff and defendants are in agreement—both parties request for discovery to proceed. Now with this motion decided, the parties can move forward with discovery.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to compel discovery (motion sequence 002) is denied as moot; and it is further

ORDERED that plaintiff's motion seeking to strike defendant's answer for failure to proceed with discovery (motion sequence 003), is denied; and it is further

ORDERED that defendants' request for sanctions is denied; and it is further

ORDERED that the parties are directed to submit a compliance conference stipulation and order on consent setting for a discovery schedule on or before February 09, 2022, and if the parties are unable to reach an agreement, they are directed to request a discovery conference before the court at sfc-part6-clerk@nycourts.gov; and it is further

ORDERED that movant is directed to serve a copy of this order with Notice of Entry on all sides within 15 days of the date of this order; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in accordance with this decision and order.

³ These discovery orders are dated April 23, 2019; August 6, 2019; and September 10, 2019.

⁴ The consolidation order and EF-22 form were uploaded to NYSCEF under index number 805153/2018 on May 11, 2021, and defendants' counsel recorded representation on May 12, 2021, under this index number.

This constitutes the decision and order of the court.

Date: 01/26/2022

/s/ Kathy J. King

KATHY J. KING, J.S.C.