

Best v Cane + Austin, LLC

2022 NY Slip Op 31135(U)

April 7, 2022

Supreme Court, New York County

Docket Number: Index No. 156723/2020

Judge: John J. Kelley

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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 **56M**

Justice

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LISA BEST, INDEX NO. 156723/2020

MOTION DATE 02/15/2022

Plaintiff, MOTION SEQ. NO. 002

- v -

CANE + AUSTIN, LLC, LYUBA GRIGORIANTS, DR. CRAIG
AUSTIN, CRAIG AUSTIN DERMATOLOGY, P.C., JOHN
DOES 1-10 AND ABC CORP. 1-10,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54,
55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISCOVERY

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3124 to compel the defendants to respond to outstanding discovery demands and requests or, in the alternative, pursuant to CPLR 3126 to impose discovery sanctions upon the defendants for their alleged failure to respond to those demands and requests and their failure to comply with prior discovery orders. The defendants oppose the motion. The motion is granted to the extent that, on or before May 24, 2022, the defendants are directed to provide the plaintiff with responses to her Document Demand 19, which sought copies of any organizational charts for Craig Austin Dermatology, P.C. (CAD), Document Demand 23, which sought copies of any printed code of conduct employed by the defendants, and Document Demand 42, which sought any texts or publications used in connection with the treatment of plaintiff.

Although the plaintiff seeks relief with respect to additional items of discovery, the court notes that it issued a compliance conference order dated March 30, 2022 that addressed most of these items, and incorporated a discovery schedule stipulated to by the parties after they

consulted with each other. Moreover, during the pendency of this motion, the defendants have provided responses to some of the outstanding requests. Hence, those branches of the motion seeking relief with respect to those items have been rendered academic. Nonetheless, the defendants have failed to produce the written organizational charts, codes of conduct, or text and publications employed in the treatment of the plaintiff, and have failed to make a showing that production would be burdensome, or that these items are completely irrelevant to the claims asserted by the plaintiff.

CPLR 3101(a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The words ‘material and necessary’ as used in CPLR 3101(a) are ‘to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy’ (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968])” (*Matter of Steam Pipe Explosion at 41st Sts & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]) so as to “assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d at 406-407; see *Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [1st Dept 2006]). 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 defendant to produce the relevant organizational charts, codes of conduct, and texts and publications, to the extent that they exist (see CPLR 3124). If the defendants contend that those documents do not exist, or that they are not in possession thereof or that, after a diligent search, the documents cannot be located, they are directed to provide the plaintiff with a *Jackson* affidavit (see *Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]), sworn to by an individual with personal knowledge, attesting to the fact that the documents do not exist, or that the defendants are not in possession of those

documents. or that they could not locate them after a diligent search, and describing the nature of the search that was undertaken.

With respect to the plaintiff's request for the imposition of discovery sanctions pursuant to CPLR 3126, she failed to establish that the defendants' conduct during the short 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]) or that their conduct constituted 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; *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]; *Figuroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015]). Hence, the imposition of such sanctions is not warranted.

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that, on or before May 24, 2022, the defendant, in response to plaintiff's Document Demands 19, 23, and 42, respectively, shall produce copies of any organizational charts for Craig Austin Dermatology, P.C., any printed code of conduct employed by the defendants, and any texts or publications used in connection with the treatment of plaintiff, or provide the plaintiff with a *Jackson* affidavit (*see Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]), as described herein; and the motion is otherwise denied; and it is further,

ORDERED that the defendants' failure to comply with the provisions of this order shall result in the imposition of sanctions, which may include the preclusion of evidence at trial or the striking of their answer.

This constitutes the Decision and Order of the court.

4/7/2022

DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: