

Shorenstein v Spiera
2022 NY Slip Op 31732(U)
May 25, 2022
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

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ERIN SHORENSTEIN, INDEX NO. 805320/2017
MOTION DATE 02/14/2022
MOTION SEQ. NO. 005

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.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 239, 240, 241, 242, 243, 244, 245, 246, 248, 251, 252, 253, 254, 255, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271

were read on this motion to/for

MODIFY ORDER/JUDGMENT

In this action to recover damages for medical malpractice, the plaintiff moves, in effect, pursuant to CPLR 2221(d) for leave to reargue her opposition to those branches of the defendants' motion seeking to compel her to provide authorizations and records with respect to her mental health treatment by Leslie Harf, Psy.D., and authorizations permitting them to obtain employment records from Proskauer Rose, LLC. Those branches of the motion had been granted by order dated October 29, 2021. Specifically, this court's October 29, 2021 order directed the plaintiff to exchange several items of discovery including,

"authorizations permitting the[] [defendants] to obtain the plaintiff's employment records from Paul Weiss Rifkind Wharton & Garrison, LLP, and Proskauer Rose, LLC;. . .

"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;. . .

"any records in the plaintiff's possession referable to her treatment with Leslie Harf."

Upon reargument, the plaintiff seeks, at the very least, for the court to conduct an *in camera* review of those records. The defendants oppose the motion, and cross-move pursuant CPLR 3124 and 3126 to compel the plaintiff to provide the discovery by date certain, and to dismiss the complaint if the plaintiff fails to do so.

The plaintiff's motion is denied, inasmuch as the court did not overlook or misapprehend any facts or relevant law that were presented to it in connection with the prior application (see CPLR 2221[d] [2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984], quoting *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). The branch of the cross motion seeking to compel the plaintiff to provide the disputed items of discovery is denied as academic, as the court already has directed the plaintiff to produce those documents and authorizations.

The court notes that the category of records at issue was previously subject to an *in camera* review by the court (Madden, J.) on August 28, 2019, after which the court held that

"accordingly, subject to a confidentiality agreement or order, Dr. Harf's records from May 5th, 2014 regarding the first reference to a rare immunological disease to the present are discoverable. As to Dr. Harf's records from February 14th, 2011, they are also discoverable without redaction. As to records discussed – issues discussed with anxiety depression and stress, the same overall conditions allegedly caused by defendant's malpractice and, in some instances, referred to a continuum of symptoms related to circumstances or relationships first complained of at the commencement of treatment with Dr. Harf in 2011."

Inasmuch as the court's August 28, 2019 ruling had already determined that Dr. Harf's records were discoverable, and that ruling was memorialized in an October 23, 2019 confidentiality order (Madden, J.) that was not appealed and remains in effect, the law of the case doctrine requires this court to deny the plaintiff's motion as to those records on that ground as well. "The law of the case doctrine is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the

same case" (*Abe v New York Univ.*, 139 AD3d 416, 416 [1st Dept 2016], quoting *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]). The doctrine "applies only to issues decided, directly or by implication, at an earlier stage of the action" (*Metropolitan Package Store Assn. v Koch*, 89 AD2d 317, 321-322 [3d Dept 1982]). Moreover, in light of the confidentiality order, the plaintiff's concern regarding potential "embarrassment and emotional pain" has also been previously addressed by the court.

As to the branch of the defendant's cross motion seeking the imposition of sanctions upon the plaintiff for failure to make discovery, this court already has held, in its October 29, 2021 order, that the plaintiff's conduct during the course of discovery has not been 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]) nor has the plaintiff's 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 [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]). Thus, the court will not impose sanctions at this juncture.

Accordingly, it is

ORDERED that the plaintiff's motion is denied; and it is further

ORDERED that the defendant's cross motion is denied; and it is further


ORDERED that on or before June 30, 2022, to the extent not already completed, the plaintiff shall fully comply with this court's October 29, 2021 Decision and Order; and it is further

ORDERED that the plaintiff's failure to comply with this Decision and Order and the October 29, 2021 order may result in sanctions; and it is further,

ORDERED that the court shall provide the plaintiff's attorney with a fill-in PDF status conference order form, the parties shall consult with one another and agree upon a schedule for further discovery, and the plaintiff's attorney thereafter shall complete form, and shall submit it to the court at SFC-Part56-Clerk@nycourts.gov on or before July 15, 2022, provided that, if the parties cannot agree on the terms of the status conference order, they shall request a remote status conference.

This constitutes the Decision and Order of the court.

5/25/2022
DATE


JOHN G. KELLEY, J.S.C.

MOTION:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN
CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE
 OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

CROSS MOTION:

APPLICATION:

CHECK IF APPROPRIATE: