Bianco v New York City Health & Hosps. Corp.
2022 NY Slip Op 32792(U)
August 17, 2022
Supreme Court, Kings County
Docket Number: Index No. 520777/17
Judge: Lawrence Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August, 2022.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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TATYANA BIANCO,

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, "JOHN DOE" 1-5 and "JANE DOE" 1-5,

Defendants.

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DECISION AND ORDER

Index No. 520777/17

Motion Sequence 2

The following e-filed papers read herein:	NYSCEF Doc Nos:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	54 – 57
Affirmation (Affidavit) in Opposition and Exhibits Annexed	58 – 62
Affirmation (Affidavit) in Reply	63

Defendant New York City Health and Hospitals Corporation (hereinafter "NYCHH") moves for an order seeking leave to reargue this court's order dated November 30, 2021 (hereinafter "November Order") granting plaintiff's motion to the extent that NYCHH was precluded from offering certain evidence at the time of trial, and upon reargument, removing any preclusion language from the November Order. In the alternative, NYCHH seeks clarification regarding the extent of said preclusion.

Background

On October 26, 2017, plaintiff, Tatyana Bianco (plaintiff) commenced this action to recover for personal injuries allegedly sustained on or around November 20, 2016 while seeking medical care at Coney Island Hospital.

On October 29, 2021, plaintiff filed the underlying motion seeking an order pursuant to CPLR 3126 striking defendant's answer for their alleged "willful and intentional misleading of the court and the plaintiff in flagrant disregard of multiple court orders" through the "intentional withholding, misleading and refusal to produce surveillance footage depicting the subject incident despite court orders and CPLR 3101(i)" (NYSCEF Doc No. 27, ¶ 2[a]). In seeking relief under CPLR 3126, plaintiff alleged, in sum and substance, that NYCHH disregarded multiple court orders and demands for surveillance video recordings of the subject incident. Further, that NYCHH took the position that it did not possess any such video. However, on or around March 30, 2021, NYCHH admitted to possessing a video recording of the subject incident. According to plaintiff, NYCHH conceded possession of the video only after it benefitted them strategically, i.e., after several depositions had already taken place (*see id.* at ¶¶ 9-10).

In deciding plaintiff's motion, the November Order found that:

> "Defendant denied the existence of surveillance videotapes until a full year after plaintiff's deposition. Counsel, in opposition, only contends that this was inadvertent, since the client did not know of the tapes' existence. Defendant, however, is charged with knowing that there are cameras in its hospital and their placement. Accordingly, defendant to provide the tapes to plaintiff without cost (and may conceal faces of other patients if HIPAA privileged) within 30 days, and defendants are precluded from using these tapes; any

> reports or documents based on the tapes or anything represented therein in evidence or referring to such tapes at trial, unless plaintiff puts the tapes in evidence" (NYSCEF Doc No. 49).

In the instant motion to reargue, NYCHH requests that the court reconsider its decision to preclude NYCHH from using or referring to the security footage on the basis that the court misapprehended the full context of plaintiff's motion, including the discovery history as it relates to the subject video, and therefore, included unwarranted preclusion language in its order. In this regard, NYCHH states that after it served plaintiff with the supplemental discovery response on or around March 30, 2021, thereby notifying plaintiff of the video's existence, the parties appeared before the IAS judge, Hon. Pamela L. Fisher, on three different occasions for a status conference. That during each conference, plaintiff raised the cost of obtaining the security footage and that Judge Fisher's court directed plaintiff, on each occasion, that to the extent that plaintiff sought disclosure of the video free of cost or disputed the cost of its production, plaintiff should file a motion. NYCHH thus points out that none of the orders resulting from these conferences directed NYCHH to exchange the security footage, let alone without cost, as it was understood that plaintiff was to file a motion for that relief.

In addition, NYCHH contends that plaintiff never formally demanded the security footage in writing and that any purported delay in the exchange of the security footage is attributable to plaintiff, who never reached out to discuss the reproduction and redaction costs and waited over five months prior to making the underlying motion, even though Judge Fisher's law clerk directed plaintiff to move by motion as soon as the issue was first

raised. NYCHH asserts that it should not be penalized with harsh preclusion language where it was always ready, willing and able to exchange the redacted video for a reasonable fee and that nothing in defendant's behavior amounts to willful or contumacious conduct.

If the court declines to grant reargument of the November Order, NYCHH argues that clarification of the November Order is appropriate because it is unclear whether NYCHH is precluded from using the security footage even though it already produced the footage to plaintiff in compliance with the court's order. Further, that it is unclear what "reports or documents" the court refers to that are "based on the tapes or anything represented therein" and that plaintiff did not even seek this remedy in her underlying motion. In the event that plaintiff relies on or uses any portion of the video during an EBT of a defense witness, NYCHH seeks clarification whether the November Order precludes NYCHH from using the transcript for purposes of motion practice or at trial.

In opposition, plaintiff argues that NYCHH fails to describe how the court overlooked facts or misapprehended the law. Plaintiff also points out that NYCHH refers to events outside of the record, proffering a self-serving description of conferences with Judge Fisher's chambers in an impermissible effort to persuade this court that Judge Fisher would have decided the motions differently. Plaintiff further argues that NYCHH acted willfully and contumaciously by affirmatively misrepresenting that they did not have video footage of the subject incident for two years after the preliminary conference order and one year after plaintiff's EBT, only to reveal, belatedly, that video footage existed after all. Under these circumstances, plaintiff asserts that preclusion is appropriate.

With regard to resettlement of the November Order, plaintiff argues that because NYCHH is not seeking to rectify a clerical error or other mistake, but, rather, is seeking to modify the November Order, that resettlement of the November Order should be denied.

In reply, NYCHH points out that plaintiff fails to dispute that the original motion should have been heard before Judge Fisher who had been handling all discovery in this matter since she was assigned the matter over a year ago. NYCHH also reiterates that the delay in the exchange of the security footage is attributable to plaintiff, who never attempted to have a good faith discussion regarding the cost of reproducing the video footage with appropriate redactions and who waited over five months to make the underlying motion. Lastly, NYCHH stresses that it would be unjust to penalize it with preclusion where NYCHH has in good faith, complied with plaintiff's discovery requests and Judge Fisher's court orders to date, including, but not limited to: producing three non-party witnesses on behalf of the institution on November 12, 2020, September 23, 2021 and January 13, 2022 and timely responding to plaintiff's witness designations on August 12, 2021, September 7, 2021 and November 17, 2021, despite some being beyond the scope of litigation and not relevant to the issue.

Discussion

It is well established that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221(d)(2); *see Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the

court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Matter of Carter v Carter*, 81 AD3d 819, 820 [2d Dept 2011] [citations and internal quotation marks omitted]).

Here, the court grants reargument based upon the proffered history of the discovery issue, and, upon reargument, the court adheres to its original decision, modified only to the extent as follows.

NYCHH does not dispute that, pursuant to the preliminary conference order dated March 25, 2019, parties are required to exchange "names and addresses of all witnesses, opposing parties' statements, photographs, surveillance tapes, and accident reports in the ordinary course of business" (NYSCEF Doc No. 9, ¶ IX[2]). In addition, contrary to NYCHH's assertion that plaintiff never requested any video recordings in writing, plaintiff's discovery demands included a demand for any video depicting the subject incident and NYCHH's formal response was that it was not in possession of any such video (see NYSCEF Doc No. 30, ¶ [l]).

CPLR 3101(i) requires disclosure of any films, photographs, video tapes or audio tapes of a party upon demand (*see Falk v Inzinna*, 299 AD2d 120, 126 [2d Dept 2002]). "While CPLR 3101(i) was enacted for the primary purpose of preventing unfair surprise in situations where a defendant uses surveillance video in an attempt to reveal that a plaintiff's injuries are not as severe as the plaintiff claims they are, the statute employs broad language, which is not limited to such a scenario, but instead requires disclosure of 'any films, photographs, video tapes or audio tapes' of a party, regardless of who created the

recording or for what purpose" (*Bermejo v New York City Health & Hosps. Corp.*, 135 AD3d 116, 146 [2d Dept 2015] [citations omitted]).

Here, it is clear that, despite NYCHH's obligation to timely provide the discovery at issue pursuant to this court's preliminary conference order and CPLR 3101(i), even under the most positive light, NYCHH neglected to conduct a cursory investigation as to whether it possessed video of the subject incident upon commencement of the discovery process. NYCHH waited nearly two years, after plaintiff's deposition and at least one defense witness's deposition, to "discover" that it possessed such video as per its supplemental discovery response. The court notes that there is no indication given, either in the instant motion or the underlying motion, that defendant made any good-faith efforts to search for the video after the preliminary conference and/or pursuant to plaintiff's discovery demands. This behavior does not connote good faith. Moreover, the delay in disclosure, i.e., after commencement of EBTs, is prejudicial to plaintiff in the preparation of her case insofar as it frustrates and prolongs the discovery process (*see Polakoff v NYU Hosps. Ctr.*, 176 AD3d 613, 614 [1st Dept 2019] [finding plaintiffs' failure to produce the audio and video recordings until after their depositions and on the eve of the continuation of defendant's deposition demonstrates willful and contumacious conduct and that defendants were prejudiced by plaintiffs' surprise tactic]).

A fair consequence of NYCHH's belated disclosure of the subject video (without good cause) is to preclude NYCHH from utilizing the video as evidence in its defense unless plaintiff chooses to rely on it for any purpose, thereby "opening the door" to its use. The November Order reflects such a ruling.

However, to the extent that the language in the November Order referring to "any reports or documents based on the tapes or anything represented therein" creates confusion, the court, upon reargument, removes said language from the November Order.

Lastly, although the November Order is clear on the issue, to answer NYCHH's hypothetical whether it would be precluded from using an EBT transcript, in motion practice or trial, where plaintiff relies on the surveillance video or uses any portion of the video during questioning of an EBT witness, the answer would be that NYCHH would not be precluded.

Conclusion

Accordingly, NYCHH's motion to reargue this court's November 30, 2021 order is granted, and upon reargument, this court adheres to its original decision granting plaintiff an order of preclusion but as modified herein.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE