

M.F. v Albany Med. Ctr.

2022 NY Slip Op 34584(U)

August 30, 2022

Supreme Court, Albany County

Docket Number: Index No. 902135-18

Judge: Christina L. Ryba

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

M.F., Infant by his Mother and Natural Guardian,
CASSANDRA DURIVAGE,

Plaintiff,

-against-

ALBANY MEDICAL CENTER,

Defendant.

DECISION/ORDER

Index No. 902135-18

RJI No. 01-18-129043

APPEARANCES:

Sanders, Sanders, Block, Woycik,
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RYBA, J.,

Plaintiff Cassandra Durivage (hereinafter plaintiff) commenced this action in April 2018 seeking to recover damages for alleged medical malpractice committed by defendant during the course of prenatal care and delivery of her daughter, the infant plaintiff. The complaint alleges that defendant's medical malpractice consisted of the failures to timely diagnose fetal macrosomia, to properly assess plaintiff for vaginal delivery, to timely perform a C-section, to properly maneuver the infant during delivery, to timely perform an episiotomy, and to apply the correct amount of traction. The complaint further alleges that as a result of such medical malpractice the infant plaintiff suffered injuries which included shoulder dystocia, arrested delivery, right Erb's palsy, permanent disability, conscious pain and suffering, mental anguish, and past and future loss of

enjoyment of life. In May 2018, defendant served an answer to the complaint along with a Demand for Bill of Particulars to which plaintiff responded by serving a Bill of Particulars in August 2018. Defendant objected to plaintiff's Bill of Particulars as impermissibly vague and incomplete, and requested that plaintiff serve an Amended Bill of Particulars that sufficiently apprised it as to the scope and nature of plaintiff's allegations no later than June 24, 2019. Plaintiff did not respond to the request.

At a September 9, 2019 scheduling conference, the Court issued an order which required the completion of all paper discovery by November 4, 2019 and directed plaintiff to file the Note of Issue, along with Expert Disclosure as required by the Third Judicial District rules, by January 13, 2020. On September 15, 2019, plaintiff served Expert Disclosure for an obstetrics and gynecology expert specializing in birth mechanics and birth injury prevention, a pediatric orthopedic expert, and a pediatric neurology expert. Defendant objected to the Expert Disclosure by letter dated October 3, 2019. With regard to all three experts, defendant objected on grounds that plaintiff failed to provide any detail as to why the management and treatment of plaintiff was allegedly unacceptable, what events caused the infant plaintiff's alleged injuries, and how said events caused her claimed injuries. Defendant also objected to all three experts on the ground that the responses failed to provide sufficient information regarding their qualifications, failed to identify the specific injuries that the infant plaintiff allegedly sustained from the alleged medical malpractice, and failed to provide detail with respect to the claim that the infant would experience developmental and social delays, difficulties with daily living and fine motor skills, and would likely require special care and services for the remainder of her life. With respect to the experts in pediatric neurology and pediatric orthopedics, defendant also objected based on the failure to explain how said experts were qualified

to render an opinion on the standard of care for labor and delivery. Finally, defendant objected to the obstetrics and gynecology expert on the ground that no detail was provided as to the opinion that defendant deviated from the standard of care during the delivery of the infant plaintiff. Defendant requested that plaintiff serve Amended Expert Disclosure resolving these objections within 30 days.

Plaintiff failed to respond to defendant's letter. Instead, plaintiff filed a Note of Issue certifying that discovery was complete on January 13, 2020. At an ensuing compliance conference held on January 22, 2020, the parties stipulated to vacate the Note of Issue so that discovery could be completed, and the Court ordered plaintiff to re-file the Note of Issue on or before March 23, 2020. However, plaintiff again failed to serve the requested Amended Bill of Particulars and Amended Expert Disclosure, and failed to file the Note of Issue by the Court-ordered deadline. By correspondence dated March 24, 2020 and April 15, 2020, defense counsel again requested that plaintiff serve an Amended Bill of Particulars and Amended Expert Disclosure, but plaintiff again failed to respond. On May 5, 2020, the Court conducted a conference and ordered plaintiff to serve the required Amended Bill of Particulars and Amended Expert Disclosure on or before June 30, 2020, and to file the Note of Issue on or before September 14, 2020. Plaintiff failed to comply with the June 30, 2020 deadline and failed to acknowledge defense counsel's subsequent requests for the outstanding responses on July 7, 2020, July 13, 2020 and July 22, 2020.

As a result, the Court conducted a further conference on September 29, 2020 and again extended the deadlines for plaintiff to comply with discovery. The Court directed plaintiff to serve Amended Exert Disclosure and other outstanding discovery by November 27, 2020 and to file the Note of Issue by January 25, 2021. Once again, plaintiff failed to comply. At the next conference held on January 26, 2021, the Court granted plaintiff yet another extension and directed plaintiff to

complete all discovery by March 26, 2021 and to file the Note of Issue by May 17, 2021. Once more, plaintiff failed to comply with discovery, and yet filed the Note of Issue on May 4, 2021.

Despite plaintiff's repeated noncompliance, the Court granted plaintiff another extension to serve Amended Expert Disclosure on or before June 15, 2021. On June 14, 2021 plaintiff served Amended Expert Disclosure for an expert in biomedical engineering and obstetrics and gynecology, an expert in pediatric neurology with an examination report dated November 23, 2019, a pediatric orthopedic expert with examination reports dated May 30, 2019 and April 30, 2021, and a new expert in obstetrics and gynecology. By email dated July 12, 2021, defense counsel requested clarification as to whether the pediatric neurology expert was the infant plaintiff's treating physician, and whether plaintiff would consent to an additional IME of the infant plaintiff in view of the new examination reports provided in the expert response. Plaintiff failed to respond. By letter and email to plaintiff's counsel dated July 23, 2021, defense counsel again reiterate the concerns outlined in her July 12, 2021 email, and also raised substantive objections to the sufficiency of the Amended Expert Disclosure. After multiple phone conferences with plaintiff's counsel regarding these issues, defense counsel served a further objection letter on July 28, 2021 clarifying its objections to the Amended Expert Disclosure, renewing the prior objections that it interposed to the original Expert Disclosure, and requesting a further Amended Expert Disclosure to resolve the objections within 30 days. By email dated July 29, 2021, plaintiff declined to provide any additional expert response.

Defendant subsequently filed a motion compelling plaintiff to serve an Amended Bill of Particulars and Second Amended Expert Responses that adequately resolved its objections, or face automatic preclusion from offering proof with regard to the disputed matters. By decision and order dated February 15, 2022, this Court found that the Bill of Particulars responses to defendant's

demand numbers 5, 7, 8, 9, and 10 were deficient in that they were impermissibly vague, opened ended and/or incomplete.¹ The Court further found that the information disclosed in plaintiff's Amended Expert Disclosure regarding the nature and extent of the infant plaintiff's injuries, and the degree to which such injuries impact her daily living, was so general and nonspecific that defendant was not enlightened to any appreciable degree as to the content of the anticipated expert testimony on those issues. In addition, the Court found that the Amended Expert Responses failed to provide all the information requested by defendant relevant to the skill, training, education and experience for the experts in obstetrics and gynecology and pediatric neurology. Plaintiff was directed to serve an Amended Bill of Particulars and a Second Amended Expert Disclosure that addressed defendant's objections within 30 days of the decision, i.e., March 15, 2022.

Plaintiff did not comply with the Court-ordered deadline. Nor did plaintiff appeal from this Court's February 15, 2022 decision and order, move for reargument thereof, or request an extension of time to comply with the Court's directive. As a result, defendant filed the present motion for an order pursuant to CPLR 3126 for the following relief: 1) precluding plaintiff from introducing any expert testimony and proof regarding the nature and extent of the infant plaintiff's injuries, the degree to which such injuries impact her daily living, and what care and special services will be

¹ The information requested by each demand was as follows: (5) each and every act of omission and commission constituting the alleged negligence and/or medical malpractice of defendant, (7) if a misdiagnosis or failure to diagnose was claimed, and if so, what diagnosis was claimed to be in error, (8) if any procedures were claimed to be improperly timed, performed, or contraindicated, identify said procedures, as well as the date, time, and place where said procedures were performed, (9) whether any treatments were claimed to be improperly timed, performed, or contraindicated, and if so identify said treatment, as well as the date, time, and place where said treatment, and (10) and if any claim that any medications were improperly timed, administered, or contraindicated, identify said medications, as well as the time and approximate place where they were administered.

needed in the future; 2) precluding plaintiff from introducing any proof from her experts in pediatric neurology, pediatric orthopedics, and biomedical engineering regarding obstetrical standards of care for labor and delivery, any alleged deviations/departures from obstetrical standards of care for labor and delivery, and any alleged causal links between any alleged deviations/departures from obstetrical standards of care for labor and delivery and any alleged injuries; 3) precluding plaintiff from introducing any proof from her expert in obstetrics and gynecology; 4) precluding plaintiff from introducing any proof from her pediatric neurology expert; and 5) striking plaintiff's Bill of Particular responses to demand numbers 5, 7, 8, 9, and 10, and precluding any proof related to those responses. Plaintiff opposes the motion. Notably, a jury trial in this matter is scheduled to commence on October 31, 2022.

Pursuant to CPLR 3126, if a party “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed”, the Court may impose one of the penalties enumerated in the statute, or may fashion any remedy which it deems appropriate and just, including an order precluding the noncompliant party from introducing evidence or using certain witnesses at trial (see, CPLR 3126). A penalty may be imposed under CPLR 3126 where a party disobeys a Court order establishing a deadline for service of expert disclosure or a further bill of particulars, willfully fails to comply with a discovery demand, or serves belated expert disclosure after filing the Note of Issue without good cause for the delay (see, Gibbs v St. Barnabas Hosp., 16 NY3d 74, 79 [2010]; Lasher v Albany Memorial Hosp., 161 AD3d 1326, 1332 [2018]; Colucci v Stuyvesant Plaza, 157 AD3d 1095 [2018], lv denied 31 NY3d 906 [2018]; Tienken v Benedictine Hosp., 110 AD3d 1389, 1391 [2013]; Cramer v Spada, 203 AD2d 739, 740 [1994]). Notably, in order to be deemed in compliance with a discovery order, a party must serve “both a timely response

and one that evinces a good-faith effort to address the requests meaningfully” (Kihl v Pfeffer, 94 NY2d 118, 123 [1999]). Once a disclosure violation is found, the nature and degree of the chosen remedy lies within the Court’s discretion and will not be disturbed absent a clear abuse of that discretion (see, Myers v Cmty. Gen. Hosp. of Sullivan Cnty., 51 AD3d 1359, 1360 [2008]; Appler v Riverview Obstetrics & Gynecology, P.C., 9 AD3d 577, 578 [2004]; Cavanaugh v Russell Sage Coll., 4 AD3d 660, 660 [2004]; Osterhoudt v Wal-Mart Stores, 273 AD2d 673, 674 [2000]).

Here, plaintiff has engaged in a prolonged and egregious pattern of noncompliance with discovery demands and Court orders. Defendant has repeatedly attempted to obtain plaintiff’s compliance for a period of more than two years by means of correspondence, Court conferences, and motion practice, all to no avail. Between January 2020 and February 2022, the Court issued seven orders directing plaintiff to comply with discovery deadlines. Each and every Court order was completely ignored, with the exception of one instance in which plaintiff served an Amended Expert Disclosure that was timely, but substantively deficient. Furthermore, each time plaintiff failed to comply with a Court-ordered deadline, the Court provided plaintiff with another opportunity to comply by granting an extension and setting a new deadline, which plaintiff would then again disregard. Plaintiff’s proffered excuses for this chronic noncompliance, i.e, her attorney’s ignorance of the law and his departure from his law firm *after* the the seventh and final deadline had already expired, are patently insufficient (see, McCue v Trifera LLC, 173 AD3d 1416, 1419 [2019]). Likewise, the speculation of plaintiff’s new counsel that prior counsel’s failure to comply with Court orders “may have” been due to unspecified difficulties presented by the COVID-19 pandemic or the inability to get in touch with experts is vague, conclusory and unsupported. Finally, plaintiff’s attempt serve an Amended Bill of Particulars and additional expert responses by attaching them to

her papers in opposition to the present motion is palpably improper. Not only are the proposed responses long overdue and served without prior leave of the Court, the responses improperly seek to identify four brand new and previously undisclosed expert witnesses, i.e., a life care planner, an economist, and two of the infant plaintiff's treating physicians, thereby introducing entirely new elements into this case more than one year after the Note of Issue was filed and a mere two months before trial is scheduled to commence.

Plaintiff's pattern of chronic disobedience of discovery demands and Court orders without a reasonable excuse gives rise to the inference that the conduct is willful (see, Shioya v Hanah Country Inn Mgt. Corp., 207 AD3d 916, 919 [2022]; Arpino v F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 210 [2012]; Doherty v Schuyler Hills, Inc., 55 AD3d 1174, 1176 [2008]; Sugar Foods De Mexico v Scientific Scents LLC, 88 AD3d 1194 [2011]; Du Valle v Swan Lake Resort Hotel, LLC, 26 AD3d 616, 617-618 [2006]; Cavanaugh v Russell Sage College, 4 AD3d 660 [2004]). Moreover, defendant has been highly prejudiced by plaintiff's extensive delay in providing the required disclosure. Defendant's request for an Amended Bill of Particulars has been outstanding for more than four years, and the demand for an Amended Expert Disclosure has been outstanding for nearly three years. Yet, the trial in this matter is scheduled to commence in two months without defendant ever having been fully apprised of the precise allegations being made or the expert proof that plaintiff expects to present at trial. While the Court acknowledges that plaintiff has finally attempted to provide the discovery responses that defendant has spent years trying to obtain, this belated effort only adds to the prejudice suffered by defendant. Thus, the Court in its discretion finds that plaintiff's ongoing course of delay and willful noncompliance warrants an order of preclusion (see, CPLR 3126 [2]).

Plaintiff argues that the remedy of preclusion is unduly harsh given the allegedly meritorious nature of the action. However, plaintiff's failure to demonstrate a reasonable excuse for the repeated and blatant disregard of the orders of this Court renders it unnecessary to consider whether plaintiff has a potentially meritorious cause of action (see, Vitolo v Suarez, 130 AD3d 610, 612 [2015]; Selechnik v Law Off. of Howard R. Birnbach, 120 AD3d 1220 [2014]). Plaintiff also argues that an order of preclusion would unfairly penalize the infant plaintiff for the failures of her prior counsel. However, the Court of Appeals has expressly stated that, while punishing parties for the failures of their counsel may be undesirable, "what is undesirable is sometimes also necessary, and it is often necessary, as it is here, to hold parties responsible for their lawyers' failure to meet deadlines" (Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 NY3d 514, 521 [2005]). Chronic disregard of court orders and discovery demands undermines the credibility of the Court's authority, impairs the integrity of our judicial system, thwarts the efficient adjudication of claims, and "breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (Gibbs v St. Barnabas Hosp., 16 NY3d at 81 [2010]; see, Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725, 726-727 [2004]; Brill v City of New York, 2 NY3d 648, 652 [2004]; Kihl v Pfeffer, 94 NY2d 118, 123 [1999]; Willis v Keeler Motor Car Co., 121 AD3d 1373, 1374 [2014]). Such conduct "should not and will not be tolerated" by this Court (Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 NY3d 514, 521 [2005]; see, Gibbs v St. Barnabus Hosp., 16 NY3d at 83 [2010]).

Defendant's motion is therefore granted in its entirety. The responses to demand numbers 5, 7, 8, 9, and 10 set forth plaintiff's Bill of Particulars are hereby stricken, and plaintiff is hereby

precluded at trial from offering any evidence, expert or otherwise, on the issues relating to said demands as follows: Each and every act of omission and commission constituting the alleged negligence and/or medical malpractice of defendant (Demand 5), any claim of alleged misdiagnosis or failure to diagnose (Demand 7), any claim that procedures were improperly timed, performed, or contraindicated (Demand 8), any claim that treatments were improperly timed, performed, or contraindicated (Demand 9), and any claim that any medications were improperly timed, administered, or contraindicated (Demand 10). Due the failure to comply with expert disclosure, plaintiff is also hereby precluded from introducing 1) any expert testimony and proof regarding the nature and extent of the infant plaintiff's injuries, the degree to which such injuries impact her daily living, and what care and special services will be needed in the future; 2) any expert testimony and proof from her experts in pediatric neurology, pediatric orthopedics, and biomedical engineering regarding obstetrical standards of care for labor and delivery, any alleged deviations/departures from obstetrical standards of care for labor and delivery, and any alleged causal links between any alleged deviations/departures from obstetrical standards of care for labor and delivery and any alleged injuries; 3) any expert testimony and proof from the ob/gyn expert; and 4) any expert testimony and proof from the pediatric neurology expert.

To the extent that the parties' contentions have not been specifically addressed herein, they have been reviewed and found to be without merit or otherwise unnecessary to discuss.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion is granted, and it is further

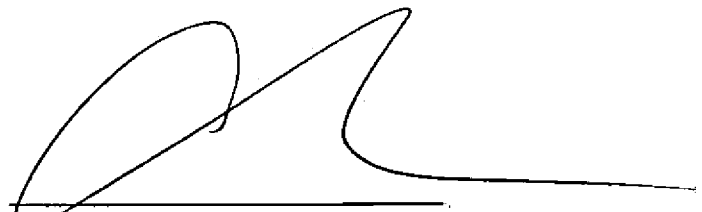
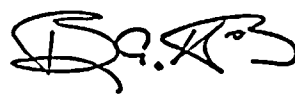
ORDERED that the responses set forth paragraph numbers 5, 7, 8, 9, and 10 of plaintiff's Bill of Particulars are hereby stricken, and plaintiff is hereby precluded from offering any evidence

at trial as to issues for which particulars were demanded in paragraph numbers 5, 7, 8, 9, and 10, and it is further

ORDERED that plaintiff is precluded at trial from introducing 1) any expert testimony and proof regarding the nature and extent of the infant plaintiff's injuries, the degree to which such injuries impact her daily living, and what care and special services will be needed in the future; 2) any expert testimony and proof from her experts in pediatric neurology, pediatric orthopedics, and biomedical engineering regarding obstetrical standards of care for labor and delivery, any alleged deviations/departures from obstetrical standards of care for labor and delivery, and any alleged causal links between any alleged deviations/departures from obstetrical standards of care for labor and delivery and any alleged injuries; 3) any expert testimony and proof from the ob/gyn expert; and 4) any expert testimony and proof from the pediatric neurology expert.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, defendant's counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: *August 30, 2022*


HON. CHRISTINA L. RYBA
Supreme Court Justice

08/31/2022