

**Ashkinazy v Gary Pillersdorf P.C. &/or LLC**

2023 NY Slip Op 30707(U)

March 7, 2023

Supreme Court, New York County

Docket Number: Index No. 100148/2014

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M**

*Justice*

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LARRY ASHKINAZY,	INDEX NO. <u>100148/2014</u>
Plaintiff,	MOTION DATE <u>12/02/2022</u>
- v -	MOTION SEQ. NO. <u>004</u>

GARY PILLERSDORF P.C. AND/OR LLC, GARY B. PILLERSDORF PLP AND/OR LLP, ESTATE OF GARY B. PILLERSDORF, THE PILLERSDORF LAW FIRM, PILLERSDORF & PILLERSDORF, GARY B. PILLERSDORF & ASSOCIATES, GARY B. PILLERSDORF & ASSOCIATES, P.C., JOHN & JANE DOES 1 THROUGH 3,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for STRIKE PLEADINGS.

*Pro se* plaintiff, Larry Ashkinazy (plaintiff), commenced this action for legal malpractice, breach of contract, fraudulent inducement, and breach of fiduciary duty against defendants Gary Pillersdorf P.C. &/or LLC, Gary B. Pillersdorf PLP &/or LLP, Estate of Gary B. Pillersdorf, the Pillersdorf Law Firm, Pillersdorf & Pillersdorf, Gary B. Pillersdorf & Associates, and Gary B. Pillersdorf & Associates, P.C. (collectively, defendants), stemming from defendants' legal representation of plaintiff in an underlying personal injury action. Defendants now move pursuant to CPLR 3126 and 22 NYCRR 202.20-c(c) to strike plaintiff's verified complaint. The motion is opposed. For the following reasons, the motion is granted in part.

Plaintiff commenced the underlying action against Consolidated Edison (Con Ed) and the City of New York, stemming from an injury while he was riding a scooter in August 2002. In August 2008, plaintiff retained defendants as his trial counsel in the underlying action. After a trial, on September 22, 2008, the jury awarded plaintiff a verdict for approximately \$15,000,000. Con Ed thereafter moved to set aside the verdict, to which the underlying court reduced the verdict as excessive. Con Ed also appealed the jury's verdict. The Appellate Division, First Department found the jury's award to be excessive, and vacated the award for past and future pain and suffering and remanded the matter for a new trial on those issues only, "unless plaintiff, within 30 days of service of a copy of this order, stipulates to reduce the award for past pain and suffering from \$2,418,000 to \$1.5 million and for future pain and suffering from \$8,060,000 to \$3.5 million, and to the entry of an amended judgment in accordance therewith" (*Ashkinazy v Consol. Edison Co. of New York*, 78 AD3d 434, 434 [1st Dept 2010]). Plaintiff agreed to reduce his damages recovery to approximately \$9,000,000.

Plaintiff alleges that defendants were negligent in their representation of plaintiff in the underlying action, including by failing to introduce proof concerning future medical expenses, pain and suffering, and future physical rehabilitation expenses, that defendants failed to properly structure plaintiff's settlement annuity, and that defendants failed to accurately calculate monies due to plaintiff pursuant to the settlement.

On June 15, 2015, defendants served a notice of discovery and inspection, a demand for medical information and authorizations, and a demand for collateral source information. In June 2017, this matter was stayed as a result of the individual defendant's death. In April 2019, while this matter was stayed, defendants furnished plaintiff, who was represented by counsel, a good faith letter requesting that plaintiff respond to discovery, including the June 2015 demands. In June 2019, the parties entered into a so-ordered stipulation wherein the parties agreed to return this matter to the active calendar, and where plaintiff was directed to comply with defendants' April 2019 letter. Defendants thereafter sent plaintiff a second letter in August 2019, requesting that plaintiff comply with his discovery obligations.

On October 31, 2019, defendants moved to compel plaintiff to respond to defendants' outstanding written discovery demands. On November 21, 2019, the parties appeared at a status conference and entered into another order related to the outstanding written discovery. The November 2019 order directed plaintiff to respond to Defendants' motion to compel and/or "provide outstanding discovery" by January 7, 2020. On February 27, 2020, the parties appeared and entered into another order related to the outstanding discovery. The February 2020 order again directed plaintiff "to respond to all outstanding discovery demands" and to do so on or before April 30, 2020. Due to the COVID-19 pandemic, on April 27, 2020, the court adjourned the April 30, 2020 appearance, and adjourned argument on the defendants' compel motion to June 11, 2020, which was subsequently adjourned to July 16, 2020. Following the July 2020 appearance, the court issued an order granting defendants' motion to compel. In the July 2020 order, the court again directed plaintiff to respond to defendants' June 2015 discovery demands by October 1, 2020. According to defendants, plaintiff failed to comply with the July 2020 order, which necessitated another discovery motion by defendants.

On October 7, 2020, defendants filed a motion to strike plaintiff's pleadings, or in the alternative, compel "plaintiff to respond to [defendants'] combined demand[s], supplement his interrogatory responses, and respond to the First Notice for Discovery and Inspection as set forth in the Court's orders dated June 13, 2019, November 21, 2019, February 27, 2020, and July 20, 2020 (NYSCEF doc. no. 19 at 1, April 26, 2022 decision and order). Before the motion was decided, plaintiff, through counsel, furnished his first response to defendants' June 2015 demand for discovery and inspection, for medical information and authorizations, and for collateral source information and authorizations. On April 26, 2022, another justice of this court denied defendant's motion to preclude, finding that plaintiff's "responses were served pursuant to the [aforementioned] court orders" (*id.* at 2).

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." A failure to comply with discovery after a court order has been issued may constitute

the “dilatory and obstructive, and thus contumacious, conduct warranting the striking of the [complaint]” (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1996]; *see CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]). It is well settled that the court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse (*see LaSalle Talman Bank, F.S.B. v Weisblum & Felice*, 99 AD3d 543 [1st Dept 2012]).

Initially, the Court finds that plaintiff has failed to comply with several orders directing him to furnish discovery, including authorizations. There is no dispute that neither the medical authorizations nor collateral source authorizations were furnished. Plaintiff argues that he should not be required to produce the requested authorizations because his medical condition is not at issue. Not so. The complaint alleges that defendants were negligent for “[f]ailing to introduce during trial the appropriate evidence regarding future medical expenses; failing to introduce during trial the appropriate evidence to support plaintiff’s claims for pain and suffering; and, failing during trial to obtain the necessary and proper experts to substantiate future physical rehabilitation expenses” (NYSCEF doc. no. 21 at ¶ 17). Clearly, plaintiff has placed his medical condition at issue based on the foregoing allegations. Thus, defendants are entitled to authorizations concerning plaintiff’s medical history and collateral sources. In any event, plaintiff already agreed to provide authorizations for both in his responses to defendants’ demands (NYSCEF doc. nos. 28 and 29).

The Court further finds that plaintiff failed to furnish a verification that the reliance upon defendants’ document production is complete and that he is not in possession of any other documents or information responsive to the requests. 22 NYCRR 202.20-c states in relevant part, that:

“The Response shall contain, at the conclusion of thereof, the affidavit of the responding party stating: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual requests is complete”

Here, plaintiff concedes that there was no such affidavit attached to plaintiff’s response dated December 20, 2020. Accordingly, plaintiff is directed to furnish defendants an affidavit concerning the completeness of his responses to demand numbers 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 17, 20, 22, 23, 24, 25, 26, 30, 32, 33, 34, 35, 36, 38, 41, 44, and 45. Plaintiff is further directed to submit an affidavit concerning whether he is in possession of the documents demanded in demand numbers: 14, 16, 18, 26, 27, 28, 36, 37, and 40.

Defendants also demonstrate that plaintiff failed to respond to 39, 42, and 43 of the June 15 demand for discovery and inspection to the extent that plaintiff stated that responsive documents and information “will be provided contemporaneously with the exchange of plaintiff’s expert witness disclosure ...” (NYSCEF doc. no. 27). Plaintiff does not dispute that the responses were never provided. Instead, plaintiff argues that he can not respond because his response is dependent on defendants’ responses to plaintiff’s demand served upon defendants. However, defendants responded to plaintiff’s demand with a substantial response. Plaintiff also

concedes this, and instead shifts his argument to that he is unable to locate the documents he needs, including the annuity agreement, within in defendants' production.

CPLR 3122(c) states that:

“Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.”

Here, defendants indicate that they served the discovery responses as they are kept in the regular course of business, and thus, they are not required to make an additional production. While the Court agrees with counsel for defendants' general statement, taking into consideration the specific facts in this action, and the parties, the Court directs defendants to furnish plaintiff a copy of the annuity agreement.

Plaintiff's argument that defendants' motion should be denied on the basis that defendants previously made the identical motion before another justice of this court, which was denied. However, a close reading of the April 26, 2022 decision and order reveals the finding that plaintiff “produced responses,” but the decision does not address the substance of the responses. Clearly, a response to a demand for discovery, for example, can include any number of documents, none of which are responsive to the precise demand. That is precisely the issue in this matter. As discussed above, plaintiff failed to respond in full to the June 2015 demands. Thus, the Court finds that the April 26, 2022 decision and order does not preclude the instant motion.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiff shall furnish medical authorizations for twenty-five (25) medical providers and authorizations for collateral source records from three (3) providers, as demanded in the June 15, 2015 demands, within forty-five (45) days; and it is further

ORDERED that plaintiff shall provide an affidavit that the limited documents produced is complete, as directed in the above decision, within forty-five (45) days; and it is further

ORDERED that plaintiff shall furnish responses to paragraphs 39, 42, and 43 of the June 15, 2015 demand, within forty-five (45) days; it is further

ORDERED that defendants shall furnish plaintiff a copy of the annuity contract and all worksheets within fourteen (14) days; and it is further

ORDERED that in the event plaintiff fails to comply with the above directives, the court may strike plaintiff's pleadings, upon written notice to the Court; and it is further

ORDERED that the parties shall appear for a conference on May 9, 2023 at 9:30 a.m.; and it is further

ORDERED that the note of issue shall be filed by July 14, 2023.

This constitutes the decision and order of the Court.



3/7/2023  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE