

Charles v New York Methodist Hosp.

2023 NY Slip Op 30797(U)

January 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 34808/00

Judge: Ellen M. Spodek

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York, on the 31st day of January, 2023.

PRESENT:

HON. ELLEN M. SPODEK,

Justice

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

Index No.: 34808/00

-----X
MARY CHARLES as Administratrix of the Estate of
CAMILLA EMANUEL,

Plaintiff,

DECISION AND ORDER

MS# 23 & 24

-against-

NEW YORK METHODIST HOSPITAL, LEON R. SHEIN,
M.D., COV STAM, M.D., RICARDO F. ISSA, M.D.,
AHMED MOHAMED, M.D., and BHAVESH PATEL,
M.D.,

Defendants.

Motion and Supporting Papers
Affirmations in Opposition
Reply Affirmations

1

2

3

Defendants New York Methodist Hospital and Ricardo F. Issa, M.D. move pursuant to CPLR §3126 to dismiss this action with prejudice and permitting the defendants to enter judgment based on the plaintiff's willful and contumacious conduct. Plaintiff opposes and cross moves to enlarge the time to secure an expert for trial. Defendant opposes Plaintiff's cross-motion.

Procedural Background

Plaintiff commenced this medical malpractice action against defendants New York Methodist Hospital and Dr. Issa by filing a summons and complaint on September 29, 2000. A preliminary

conference was held on May 18, 2001. An order dated December 18, 2006, by Justice Held directed that the Note of Issue be filed by June 4, 2007. This matter was marked disposed/dismissed on June 15, 2007, on the grounds that plaintiff failed to file the Note of Issue as ordered in the Compliance Conference order. On October 14, 2008, New York Methodist Hospital and Dr. Issa moved for a final order of dismissal with prejudice based on the case being marked disposed/dismissed on June 15, 2007. In response to this motion for a final order of dismissal with prejudice, plaintiff brought a motion to restore. On April 30, 2009, the Court denied the defendant's motion and granted plaintiff's motion to restore the case to the active pre-trial calendar, with the Note of Issue to be filed by June 30, 2009. Plaintiff filed the Note of Issue on June 24, 2009.

Several pre-trial conferences were held in 2010. Plaintiff was unable to retain an expert in time for trial, and subsequently the Note of Issue was vacated, and the case was sent back to the Central Compliance Part pursuant to a September 29, 2010 order by Justice Rosenberg. On December 8, 2010, the parties appeared for a conference in the Central Compliance Part. In an Order dated December 8, 2010, plaintiff was directed to file a new Note of Issue by April 21, 2011. The Order further directed plaintiff to serve expert witness disclosures before the filing of the new Note of Issue and Certificate of Readiness. Plaintiff did not file a new Note of Issue by April 21, 2011 and did not serve expert witness disclosures. No further action was taken, and the case remained dormant until 2013.

On or about April 11, 2013, defendants New York Methodist Hospital and Dr. Issa, served plaintiff with a 90-day Notice. Dr. Shein, who was still a co-defendant at that time, served a 90-day Notice on April 22, 2013. In response to the 90-day Notices, on or about July 10, 2013, plaintiff filed a Motion for an Order seeking to return the case to the active calendar and leave to file a Note of Issue.

In an order dated February 7, 2014, Justice Schneier issued an Order granting plaintiff's motion to restore the case to the active calendar and directing plaintiff to file a Note of Issue on or before March 3, 2014.

Plaintiff filed a new Note of Issue on February 26, 2014. Plaintiff also served an expert witness disclosure in February of 2014. Plaintiff's expert witness disclosure sets forth that the plaintiff may call at the time of trial, James M. Balliro, M.D., an expert in general laparoscopic, vascular, and bariatric surgery. Dr. Balliro died on August 22, 2015.

Dr. Shein moved for summary judgment, which was granted by an Order of Justice Jacobson on January 2, 2015. On March 23, 2015, this matter was remanded by the Court to the active Trial Calendar. Trial appearances took place.

On September 13, 2016, the case was on the Medical Malpractice Trial Readiness Part calendar. The case went through several conferences in the Medical Malpractice Trial Readiness Part between 2016 and 2017. A trial date was scheduled for October 4, 2017, at which time the case was to be assigned to a judge and a Trial date selected by the court. Plaintiff did not serve a new expert disclosure at that time.

On September 25, 2018, the matter was assigned to Justice Martin. There were appearances before the court on December 4, 2018, January 22, 2019, and March 12, 2019. The case was again determined to be ready for trial. Plaintiff did not serve new expert disclosures at that time.

On July 17, 2019, Justice Knipel referred the case back to Justice Martin. Plaintiff was directed to send a letter to Justice Martin requesting the the matter be placed back on the Trial Calendar and be given a trial date.

On February 24, 2020, a motion was made on behalf of defendants Methodist Hospital and Dr. Issa seeking summary judgment and dismissing the action on the basis of plaintiff's willful and

contumacious conduct in failing to provide the Court Ordered expert witness disclosure. The motion was served prior to the court shutdown due to the pandemic in March of 2020.

Opposition to the motion was received on March 5, 2021. In opposition, plaintiff acknowledged that she had not retained an expert to replace Dr. Balliro and advised that she was working on retaining a new expert. This motion was fully submitted, and oral argument took place before the Court on May 6, 2021. An Order was entered on September 3, 2021, denying Defendants' motion to dismiss and directing plaintiff to serve the expert disclosure within 60 days of service of the Order with Notice of Entry.

Plaintiff's counsel did not serve the expert disclosure within 60 days. On December 17, 2021, a letter was sent via U.S.P.S. to plaintiff's counsel requesting the expert witness disclosure. No response was received. A second letter was sent on January 17, 2022, requesting the expert witness disclosure. No response was received.

Defendants hired a private investigator to personally serve plaintiff with a third good faith letter. On February 3, 2022, plaintiff's counsel was served at his office with a third good faith letter with Notice of Entry.

Discussion

Defendants seek dismissal pursuant to CPLR 3126 on the ground that plaintiff has failed to comply with CPLR 3101 (d) (1) (i). CPLR 3101(d) (1) (i) requires that parties, upon request, shall identify each person whom the party expects to call as a witness at trial. Defendants made such requests by letter on December 17, 2021, January 17, 2021, and February 3, 2022. To date, plaintiff has not served the expert disclosure. However, CPLR 3101 (d) (1) (i) does not require a response at any particular time or "mandate that a party be precluded from expert testimony merely because of non-compliance with the statute *see Rowan v Cross Country Ski & Skate, Inc.*, 42 AD3d 563, 564 (2 Dept. 2007); *Rivers v Brinbaum* 102 AD3d 26, 35 (2d Dept. 2012); *Saldivar v I.J. White Corp.*, 46

AD3d 660, 661 (2d Dept. 2007). Trial courts are vested with broad discretion “in making determinations concerning matters of disclosure,” including imposing a penalty on a party for failure to comply with CPLR 3101 (d) (1) (i) *see Arpino v F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 209 (2 Dept 2012); Rivers 102 AD3d at 52 (Miller J., concurring)*. Generally, preclusion is unwarranted without evidence of intentional or willful failure to disclose and a showing of prejudice by the party seeking preclusion. *See Rowan 42 AD3d at 564; Aversa v Taubes 194 AD2d 580, 582 (2d Dept. 1993); see also Moody v Hmoud, 193 AD3d 1007, 1010 (2d Dept 2021); Mazzurco v Gordon 173 AD3d 1001, 1002 (2d Dept. 2019)*.

The argument in this case boils down to plaintiff’s failure to comply with the September 3, 2021 Order of this Court. That order explains that up to the point of that motion and argument, plaintiff had complied to the best of her ability with previous Orders setting forth deadlines for expert disclosure. Plaintiff served her expert disclosure in 2014. Plaintiff’s expert died in 2015. Plaintiff did not learn of the expert’s death until 2017. On September 3, 2021, plaintiff was directed by Order of this Court to serve her expert disclosure within 60 days. Plaintiff is correct that the previous orders from 2006, 2007, and 2010 were the subject of resolved motion practice which took place in 2021 *Reply Aff. On Cross Motion Para 4*. The instant motion is not the proper forum in which to re-litigate the issues that were decided by this Court’s 2021 Order. Defendants did not move to re-argue nor did they appeal this Court’s 2021 Order and therefore the issues of plaintiff’s conduct up to that point have already been addressed.

To succeed in the instant motion, Defendants must demonstrate plaintiff’s willful failure to disclose the information required by CPLR 3101 (d) (1) (i) as well as prejudice. Plaintiff essentially concedes that she has not retained a new expert since Dr. Balliro’s death in 2015. There is nothing to indicate that plaintiff has intentionally withheld the identity of any person who she “expects to call as an expert witness at trial,” because she does not currently have an expert. Plaintiff claims that

her difficulty in securing an expert has not been for lack of effort, but rather due to circumstantial difficulties including those caused by the pandemic. Under these circumstances, plaintiff's failure to give an expert disclosure cannot be deemed willful or contumacious *Mazzurco* 173 AD3d 1001; *Acramone-Makinano v Britton frap., Inc.*, 117 AD3d 889, 891 (2d Dept 2014); *Burbige v Siben & Ferber* 115 AD3d 632, 633 (2d Dept 2014).

Regarding prejudice, Defendants claim that plaintiff's excessive delay in providing her expert disclosure has caused them to lose contact with certain essential non-party witnesses *Aff. In Supp. Para 38*. For example, the emergency room physician, Dr. Chu, has relocated from New York City to Buffalo and has not responded to defendants' letters. Nurse Cheng, who was deposed, has not been responding to emails. *Id para 39*. However, none of these issues are the direct result of plaintiff's failure to provide expert disclosure. There is nothing to indicate that Defendant's witnesses would have been more cooperative if Plaintiff had complied with the 2021 Order. Defendant has not submitted any proof of the failed attempts to contact their witnesses, nor any proof that these witnesses will in fact be unable to appear due to the long delays in scheduling a trial. Additionally, the delays in setting a trial date caused by the pandemic and the Court's subsequent backlog cannot be overlooked. There were very real logistical difficulties in scheduling medical malpractice actions in particular during the last three years. Therefore, Defendants are not entitled to dismissal or preclusion based on Plaintiff's failure to provide CPLR 3101 (d) (1) (i) notice *Mazzurco*, 173 AD3d at 1002; *Burbige*, 115 AD3d at 633; *Moody*, 192 AD3d at 1010.

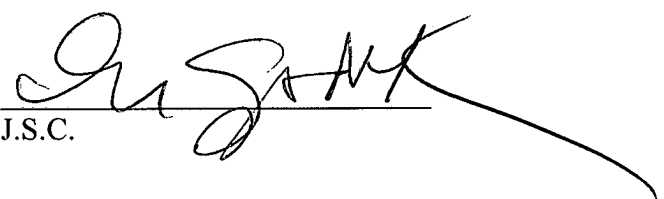
Medical malpractice cases are being scheduled for trial once again. Given that there is no prospect of settlement and that this case has been pending for 23 years, this case must proceed to trial. The Court directs plaintiff to provide 3101 (d) (1) (i) notice regarding the expert within 45 days of service of a copy of this order with Notice of Entry. No further extensions of time will be given. If at that time plaintiff has not provided the requisite notice, plaintiff will be precluded from

using expert testimony at trial. *See Rivers 102 AD3d at 41-42* (trial courts have the discretionary authority to impose specific deadlines for expert disclosure). This Court can direct such relief even though defendants did not specifically request it because they included a general relief clause in their notice of motion and relief compelling CPLR 3101 (d) notice is close enough to the original relief requested.

Defendants' motion is granted to the extent that plaintiff shall provide defendants with 3101 (d) (1) (i) disclosure within 45 days of service of a copy of this order with Notice of Entry, and if plaintiff fails to do so she is precluded from using expert testimony at trial. Plaintiff's cross-motion for an additional 120 days to serve 3101 (d) (1) (i) notice is denied. The parties shall appear for a trial scheduling conference on May 15, 2023 at 9:45am via MS Teams. If at that time the plaintiff has not served an expert disclosure this case may be dismissed, as medical malpractice trials require expert testimony.

This constitutes the decision and order of the court.

ENTER:


J.S.C.

Honorable Ellen M. Soodak