

**Moss v Mumford**

2023 NY Slip Op 30825(U)

March 9, 2023

Supreme Court, New York County

Docket Number: Index No. 805392/2017

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*

-----X

KATHY MOSS, as administrator of the estate of ESTHER  
MOSS, deceased,

Plaintiff,

- v -

JAMES MCNEILL MUMFORD, M.D., MOUNT SINAI BETH  
ISRAEL, BETH ISRAEL MEDICAL CENTER, and MOUNT  
SINAI HEALTH SYSTEM, INC.,

Defendant.

-----X

INDEX NO. 805392/2017

MOTION DATE 11/15/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164

were read on this motion to/for EXTEND TIME/DISCOVERY/PREFERENCE.

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves (a) to extend her time to file a note of issue, (b) pursuant to CPLR 3124 to compel the defendants Mount Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc. (collectively the Mount Sinai defendants), to comply with prior discovery orders and outstanding demands for discovery and inspection, and directing them to schedule the deposition of Anthony Conrad, P.A., or, in the alternative, (c) pursuant to CPLR 3126 to strike the Mount Sinai defendants' answer. The plaintiff further moves pursuant to CPLR 2308(b) to enforce a subpoena so as to compel nonparty James McNeill Mumford, M.D., to submit to a deposition, and pursuant to CPLR 3403(b) to grant her a special trial preference. The Mount Sinai defendants oppose those branches of the motion addressed to their alleged failure to comply with discovery demands and orders. The motion is granted to the extent that:

- (a) the plaintiff's deadline for the filing of the note of issue is extended until June 30, 2023,

- (b) the Mount Sinai defendants are directed to provide the plaintiff, on or before April 25, 2023, with copies of relevant agreements between them and the Institute for Family Health (IFH) that were in effect between October 1, 2015 and November 30 2015, as well as records of insurance certificates, insurance claims, insurance documents, invoices, bills, and payment memoranda exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and IFH in connection with the treatment of the plaintiff's decedent between October 1, 2015 and November 30, 2015, or, in the alternative, shall provide, on or before April 25, 2023, a properly notarized *Jackson* affidavit, sworn to by a person with knowledge of the Mount Sinai defendants' record keeping protocols, attesting that he or she undertook a diligent search for those records, describing with particularity the search undertaken, and affirming that the Mount Sinai defendants either are not in possession of those documents or could not locate them,
- (c) the Mount Sinai defendants are directed to produce Conrad for a deposition on or before April 7, 2023,
- (d) the Mount Sinai defendants are conditionally precluded from adducing evidence at trial in support of their defenses should they fail to comply with the deadlines set forth herein, and the conditional order shall become absolute upon their failure to so comply, and
- (e) Mumford shall submit to a nonparty deposition on or before April 21, 2023.

The motion is otherwise denied.

The most recent discovery conference in this action was conducted by Justice Martin Shulman on March 12, 2019. In the status conference order issued as a consequence of that conference, the court directed the Mount Sinai defendants to submit to a deposition on or before September 30, 2019, and to comply, on or before April 12, 2019, with the discovery directives and deadlines set forth in a May 29, 2018 preliminary conference order. In a March 2, 2020 order (MOT SEQ 001), the court (Shulman, J.) granted the plaintiff's motion to voluntarily discontinue the action against Mumford, thus changing his status in this action from a party to a nonparty.

In an order dated February 11, 2021 (MOT SEQ 002), this court granted the plaintiff's motion to compel discovery to the extent of directing the Mount Sinai defendants to conduct the plaintiff's deposition on or before March 25, 2021. Upon the plaintiff's representation that she would voluntarily produce other relatives of the decedent for depositions, the court directed the

Mount Sinai defendants to conduct the deposition of nonparty Emily Moss on or before April 8, 2021, and the deposition of nonparty Michael Moss on or before April 15, 2021. The court further directed that the defendants Beth Israel Medical Center and Mount Sinai Health System, Inc., must submit to a deposition on or before April 29, 2021, provided that the plaintiff designated a deposition witness on or before March 31, 2021. It further directed that any other nonparty depositions were to be conducted on or before May 27, 2021.

In addition, the February 11, 2021 order provided that, on or before April 15, 2021, the defendants Beth Israel Medical Center and Mount Sinai Health System, Inc., were required fully to respond to so much of the plaintiff's March 29, 2018 notice for discovery and inspection as requested them to produce relevant agreements between them and IFH that were in effect between October 1, 2015 and November 30 2015, as well as records of invoices, bills, and payment memoranda exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and IFH in connection with the treatment of the decedent between October 1, 2015 and November 30, 2015, bills submitted by or on behalf of Mumford by Beth Israel Medical Center/Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015 in connection with the decedent's treatment, and documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015. Moreover, the court directed that, on or before April 15, 2021, the Mount Sinai defendants were required to submit to the court, for in camera inspection, documents reflecting the admitting privileges that Mumford had with Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015. The court also extended the plaintiff's note of issue filing deadline until September 30, 2021.

In a supplemental order dated April 16, 2021, the court, upon conducting an in camera review of the documents submitted to it with respect to Mumford's admitting privileges with the Mount Sinai defendants, directed that, on or before May 19, 2021, the Mount Sinai defendants

were to provide the plaintiff with a copy of an April 28, 2014 letter from Barbara J. Barnett, M.D., to Mumford approving his request for admitting privileges.

Although no party requested a further discovery conference to resolve outstanding discovery issues, the court, in an order dated January 10, 2022 (MOT SEQ 003), granted the plaintiff's second motion to compel discovery to the extent of directing that (a) the Mount Sinai defendants were fully to comply with the court's February 11, 2021 order, (b) they produce Barbara J. Barnett, M.D., for a deposition, with certain limitations on subject matter, (c) provide the full name, address, and cell phone number (if no longer employed) of the individual described in the plaintiff's March 12, 2019 demand for discovery and inspection, (d) produce an unredacted version of the agreement between the defendant Beth Israel Medical Center and IFH, (e) produce records of invoices, bills, and payment memoranda exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and IFH in connection with the plaintiff's decedent's treatment between October 1, 2015 and November 30, 2015, or provide an affidavit from a person with knowledge attesting that a search was conducted for such records that detailed the particulars of the search, and explained that, after that search, no such records could be located, and (f) produce documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015. The court fixed April 29, 2022 as the deadline for the Mount Sinai defendants' production of an institutional witness, ordered that any nonparty depositions were to be conducted on or before May 31, 2022, and extended the note of issue filing deadline until June 30, 2022.

In its January 10, 2022 order, the court explicitly provided that "the failure of the defendants Beth Israel Medical Center and/or Mount Sinai Health System, Inc., to comply with these directives, shall, upon the plaintiff's motion, result in the issuance of an order precluding those defendants from adducing evidence in support of their defenses at trial."

On March 29, 2022, or 30 days before the deadline for the Mount Sinai defendants' production of an institutional witness, the plaintiff designated Anthony Conrad, P.A., as the witness she wished to depose. The Mount Sinai defendants did not produce Conrad for a deposition by the April 29, 2022 deadline. By letter dated May 3, 2022, the plaintiff advised the Mount Sinai defendants that they had failed to comply with the court's prior two orders in connection with her request for copies of insurance information concerning IFH's provision of treatment to her decedent. She further asserted that they had failed to respond to a recent demand for production of radiographic films and hospital protocols. In a responsive letter dated May 4, 2022, the Mount Sinai defendants offered to schedule a date for Conrad's deposition even though he was not currently their employee, and advised the plaintiff that the radiographic films had already been mailed. The Mount Sinai defendants indicated that they were in the process of searching for relevant hospital protocols, and that they would be delivered under separate cover. With respect to the plaintiff's request for insurance information related to IFH's treatment, the Mount Sinai defendants characterized it as having been made in "bad faith" because any such documentation was "solely in the control of" IFH.

CPLR 3124 provides that

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

It is thus appropriate for the court to fix a firm deadline for the Mount Sinai defendants to produce the records related to IFH and relevant hospital protocols (*see* CPLR 3124). The court directs the Mount Sinai defendants to produce those records or provide a *Jackson* affidavit with respect to the IFH material on or before April 25, 2023.

CPLR 3126 authorizes the court to sanction only 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" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1998] [emphasis

added]). A party's failure to satisfy his or her discovery obligations, particularly after a series of court orders has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*id.* at 489; see *CDR Creances S.A. v Cohen*, 104 AD3d 17 [1st Dept 2012]; *Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

The mere fact that the Mount Sinai defendants served discovery materials during the pendency of the plaintiff's motion to strike their answer does not render their prior failure to make discovery willful or contumacious (see *Chamberlain, D'Amanda, Oppenheimer & Greenfield v Beauchamp*, 247 AD2d 858, 859 [4th Dept 1998]; see also *Butler v Knights Collision Experts, Inc.*, 165 AD3d 406, 407 [1st Dept 2018]). Nonetheless, where the disclosure that was served during the motion's pendency is completely inadequate, and

"a party is found to have engaged in a protracted pattern of delay and noncompliance with numerous court orders, willful and contumacious conduct may be inferred, and it is a provident exercise of discretion under such circumstances to reject the party's excuse for such conduct"

(*Transasia Commodities Inv. Ltd. v NewLead JMEG, LLC*, 169 AD3d 591, 592 [1st Dept 2019]).

"[T]he drastic remedy of striking an answer is not appropriate where there is no clear showing that the failure to comply with discovery demands was willful or contumacious" (*Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 785 [2d Dept 2008]) .

The court cannot conclude that the Mount Sinai defendants' responses were "completely" inadequate, and the fact that they provided several items of disclosure and attempted to schedule Conrad's deposition during the pendency of the motion suggests that the plaintiff has not made a "clear showing" that their delay in providing requested documents was willful and contumacious. Nonetheless, the court rejects the Mount Sinai defendants' repeated contention that they need not produce invoices, statements, insurance certificates, and insurance notices that are referable to IFH, despite the fact that the documents may be in their possession, merely because IFH has "control" over them. Even where documents may be available from another source, a party in possession of such documents is not excused from

any obligation to produce them in the course of discovery (see *Z.D. v MP Mgt., LLC*, 150 AD3d 550, 552 [1st Dept 2017]; *Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 556 [1st Dept 2015], *affd* 27 NY3d 985 [2016]; *Alfaro v Schwartz*, 233 AD2d 281, 282 [2d Dept 1996]). Moreover, if the Mount Sinai defendants actually are not in possession of those documents, they are required to provide the plaintiff with a *Jackson* affidavit (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]), as directed in this court's prior orders, in which a person with knowledge attests that the Mount Sinai defendants either are not in possession of the documents, or that they undertook a diligent search that did not yield any responsive documents, as long as they described the search that was undertaken.

Regardless of whether a contract between IFH and the Mount Sinai defendants obligated the latter to retain the disputed documents, as the plaintiff contended, she has provided no proof, but only rank speculation, that, in light of the contract, the Mount Sinai defendants must indeed be in possession of the documents. Parties to contracts breach them all of the time. Nonetheless, the Mount Sinai defendants have never provided an affidavit explicitly averring that they were not in possession of the requested documents, or one that described the nature of any diligent search for those documents. Instead, they provided an attorney's statement to the effect that they "had no reason to believe such documents exist, however, should any be located, they would be provided." Notwithstanding the plaintiff's characterization of the proposed, unsigned search affidavit that apparently had been provided to her, the Mount Sinai defendants' response in this regard is insufficient in any event. Under the circumstances presented here, the appropriate sanction is a conditional order of preclusion (see *Felock by Felock v Albany Med. Ctr. Hosp.*, 258 AD2d 772, 774-775 [3d Dept 1999]; *Ferguson v Belair Constr. Corp.*, 225 AD2d 517, 518 [2d Dept 1996]; *J.R. Stevenson Corp. v Dormitory Auth. of State of N.Y.*, 112 AD2d 113, 118 [1st Dept 1985]). Hence, should the Mount Sinai defendants fail either to produce the requested documents in a timely fashion, or provide a properly notarized *Jackson* affidavit from a person with knowledge of their record-keeping

protocols that describes, with particularity, the nature of the search that was undertaken, including the identification and description of specific computer files and paper files that were searched, they shall be precluded from adducing evidence in support of their defenses at trial. The court cautions the Mount Sinai defendants that this conditional order shall become absolute upon their failure to comply with its provisions (*see Trabanco v City of New York*, 81 AD3d 490, 492 [1st Dept 2011]; *Rampersad v New York City Dept. of Educ.*, 30 AD3d 218, 219 [1st Dept 2006]).

Unless Mumford properly was served with an appropriate subpoena, he has no continuing obligation to respond to the plaintiff's discovery demands, including a request that he submit to a deposition, as he no longer is a party to the action (*see Squitieri v City of New York*, 248 AD2d 201, 204 [1st Dept 1998]; *Rampart Brokerage Corp. v Ribs NY, LLC*, 2014 NY Slip Op 30938[U], \*20-21, 2014 NY Misc. LEXIS 1672, \*30 [Sup Ct, N.Y. County, Apr. 8, 2014]). Although the plaintiff did not submit proof, with the instant motion, that she had caused Mumford to be served with a subpoena, the court notes that she had previously uploaded, as Docket Entry No. 92, a copy of a subpoena addressed to Mumford and an affidavit of service reflecting that she had caused the subpoena to be served upon him on October 7, 2020. Although this court's January 11, 2022 order did not expressly compel Mumford to appear for a nonparty deposition, it did fix an outside date of May 31, 2022 for the completion of all nonparty depositions. Since Mumford already was under subpoena at that juncture, the court concludes that the order, in effect, compelled him to submit to a nonparty deposition by that date. Since he failed to do so, the court now directs Mumford to submit to a nonparty deposition no later than April 21, 2023, and cautions him that his failure to do so may result in a finding of contempt.

As relevant to the plaintiff's request for a special trial preference, CPLR 3403(a)(5) provides as follows: "Preferred Cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference: . . . an action to recover damages for medical, dental or podiatric malpractice." CPLR 3403(b) provides, in

relevant part, that “[u]nless the court otherwise orders, notice of a motion for preference *shall be served with the note of issue by the party serving the note of issue*; . . . or thereafter during the pendency of the action upon the application of a party who reaches the age of seventy years” (emphasis added) (see generally *Tacinelli v Liberty Lines*, 123 AD2d 756, 758 [2d Dept 1986]). Since the note of issue has yet to be served, and discovery is continuing, the plaintiff’s motion for a trial preference is premature (see *Seraita v Seraita*, 93 AD2d 725, 726 [1st Dept 1983]).

The court expresses its dismay that virtually all of the discovery disputes arising in this action have been the subject of motion practice, rather than having been resolved, as most discovery disputes are, in conferences with the court. The parties have not participated in a discovery conference for four years because every issue has been made the subject of a motion, in spite of the fact that these very issues could have been resolved in discovery conference orders. The repeated employment of motion practice to resolve discovery disputes here should be the exception, not the rule, and the court will not countenance the exaggerated, hyperbolic, and bombastic language set forth in the parties’ motion papers.

In light of the foregoing, it is

ORDERED that the plaintiff’s motion is granted to the extent that

- (a) the plaintiff’s deadline for the filing of the note of issue is extended until June 30, 2023,
- (b) the defendants Mount Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc., are directed to provide the plaintiff, on or before April 25, 2023, with copies of relevant agreements between them and the Institute for Family Health that were in effect between October 1, 2015 and November 30 2015, as well as records of insurance certificates, insurance claims, insurance documents, invoices, bills, and payment memoranda exchanged between the defendants Beth Israel Medical Center and/or Mount Sinai Health System, Inc., on the one hand, and Institute for Family Health, on the other, in connection with the treatment of the plaintiff’s decedent between October 1, 2015 and November 30, 2015, or, in the alternative, they shall provide, on or before April 25, 2023, a properly notarized *Jackson* affidavit, sworn to by a person with knowledge of the record keeping protocols of the defendants Mount Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc., attesting that he or she undertook a diligent search for those records, describing with particularity the search undertaken, and affirming that the defendants Mount

Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc., either are not in possession of those documents or could not locate them despite the search,

- (c) the defendants Mount Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc., are directed to produce Anthony Conrad, P.A., for a deposition on or before April 7, 2023,
- (d) the defendants Mount Sinai Beth Israel, Beth Israel Medical Center, and Mount Sinai Health System, Inc., are conditionally precluded from adducing evidence at trial in support of their defenses unless they comply with the deadlines set forth herein, and the conditional order shall become absolute upon their failure to so comply, and
- (e) nonparty James McNeill Mumford, M.D., shall submit to a nonparty deposition on or before April 21, 2023, and may be subject to contempt of court should he fail to appear for a deposition on or before that date,

and the motion is otherwise denied; and it is further,

ORDERED that, within 10 days of the entry of this order, the plaintiff shall serve a copy of this order with notice of entry, by regular mail, upon both Fumuso, Kelly, Swart, Farrel, Polin & Christesen, as the attorneys for nonparty James McNeill Mumford, M.D., at 110 Marcus Boulevard, Hauppauge, New York 11788, and upon James McNeill Mumford, M.D., at 101 St. Andrews Lane, Glen Cove, New York 11542, and shall file proof of service thereof.

This constitutes the Decision and Order of the court.

3/9/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE