

Newark Rehabilitation Ctr., PA v Simela

2023 NY Slip Op 32555(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 651425/2022

Judge: Melissa A. Crane

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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. MELISSA A. CRANE **PART** **60M**

Justice

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NEWARK REHABILITATION CENTER, PA,
REHABILITATION MEDICINE PRACTICE OF N.Y., P.L.L.C.

Plaintiff,

INDEX NO. 651425/2022

MOTION DATE N/A

MOTION SEQ. NO. 004

- v -

ASHLEY SIMELA, YACIRIS GONZALEZ,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 125, 126, 127, 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, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 216, 217, 218, 219, 220, 221, 226

were read on this motion to/for

MISCELLANEOUS

Upon the foregoing documents, it is

This case, commenced on March 28, 2022, involves allegations that defendants conspired to steal patients away from plaintiffs. The motion for discovery sanctions is granted in accordance with the reasoning on the record of 7/25/2023.

In particular, the phone records from T Mobile show that defendant Gonzalez' Jackson affidavit [EDOC 180] was deliberately vague to avoid an inconvenient truth: that she and defendant Simela failed to produce, or even preserve, text messages at the heart of the chronology in this case, even after litigation had been commenced. For example, Gonzalez swears in her affidavit that "in or around June of 2022, the screen [on her cellphone] became damaged to the point that the cell phone was not useable at all;" that she therefore switched phones, and the new phone lacked a SIM card so "no data could be transferred." Yet, the phone records demonstrate messages between defendant Gonzalez and defendant Simela throughout

most of June that were not produced. On the record, defense counsel argued that Gonzalez was not sure of the exact date she switched her phone so that her Jackson affidavit is not false.

What the court cannot understand is how Gonzalez could not know the exact date she switched her phone. To find this out, she would not even have to leave the house. She could have looked at her online T Mobile account for that exact information. Therefore, the court finds that the failure to give an exact date in June was disingenuous. Moreover, the phone records from T Mobile, that plaintiffs obtained, demonstrate that Gonzalez and Simela exchanged extensive communications during the time period in question, including text messages, that were not produced.

Gonzalez' Jackson affidavit with respect to her second phone (her work cell phone) is even worse. Gonzalez testifies in her affidavit that she conveniently "lost" the work cell phone. Specifically, she "may have left my cell phone at the office or misplaced it somewhere" (EDOC 180 ¶ 10). Despite claiming she lost the phone, the T Mobile records showed it was used to communicate with Simela during April 2022. To avoid this inconvenient document, Gonzalez again fudges the date claiming that for the work cell phone "the account was closed in or around April 2022" (EDOC 180 ¶ 15). Again, it strains credulity she could not have ascertained the exact date she closed the account from her T Mobile records. The failure to produce records relating to this cell phone from highly relevant time periods is inexcusable.

In addition to Ms. Gonzalez' mishaps with her broken personal cell phone and lost work cell phone, Dr. Simela had the misfortune not to realize that his cell phone only stored messages for 30 days (see EDOC 176 ¶ 8). Although the Jackson affidavit is vague, Dr. Simela apparently learned this in November 2022, a good nine months into this litigation. Thus, Dr. Simela failed to take efforts to preserve relevant information after the commencement of this litigation. Nor

did he have a forensic consultant try to reconstruct the lost text messages. Nor is there evidence he asked his carrier to do so.

Accordingly, due to the failure to preserve relevant information, mostly after the commencement of this litigation, the court issues an adverse inference that the missing text messages tend to show that defendants Simela and Gonzalez conspired to steal patients away from plaintiffs.

Another point of contention between the parties has been Plaintiff's theory that defendants had Gonzalez pretend to be a woman named Angela Polonio. The name "Angela" has appeared on many communications with and for Simela (see e.g. EDOC 175, email from Ashley Simela to Angela Polonio, dated April 3, 2022; EDOC 176 and 178, emails from an "Angela" working for Dr. Simela; EDOC 184, email from Gonzalez referring to an email address: "angela@doctorsimela.com").

Despite documents clearly indicating that someone named "Angela" worked for Dr Simela, defendants have maintained they have absolutely no contact information for her. This situation begs the question why Dr. Simela does not have contact information for someone who worked for him. How did he pay her? Where are the tax records? The lack of any records for an employee lends credence to plaintiffs' suspicion that Angele Polonio and defendant Gonzalez are one and the same.

To counter this appearance, defendants interpose the affidavit of Norman Fields who swears under oath that he connected Polonio with Dr Simela in February 2022. Yet, despite employing this so-called Ms. Polonio for a week, Mr. Fields also has no contact information except that Polonio lived in the Bronx. This is strange. How did Mr. Fields pay Ms. Polonio then? Did he even file a W-2 or 1099 as required by law?

It simply strains credulity that, if Angela Polonio was a separate individual who worked for Dr. Simela and Mr. Fields, neither would have any contact information for her, especially for tax purposes. Accordingly, the court issues the adverse inference that Polonio and Gonzalez are one and the same.

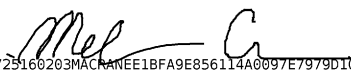
The court also awards plaintiffs their reasonable attorney’s fees spent uncovering defendant’s misrepresentations and time spent on this motion. Defendants’ positions in this lawsuit, including their Jackson affidavits, establish a pattern of deception and lack of candor. Therefore, the court finds that defendants have behaved in a contumacious, willful and dilatory fashion, such that monetary sanctions in the form of attorney’s fees, in addition to the two aforementioned adverse inferences, are appropriate.

Accordingly, it is

ORDERED THAT the court grants the motion as set forth herein; and it is further

ORDERED THAT counsel for plaintiff’s shall have until August 9, 2023 to file papers in support of an inquest on attorney’s fees spent uncovering defendant’s misrepresentations and time spent on this motion; defendants shall have until August 25, 2023 to interpose opposition; the parties are to email the court once the inquest is fully submitted; and it is further

ORDERED THAT the parties are to attend a pre-trial conference on September 12, 2023 at 10:00 am over Microsoft teams.


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<u>7/25/2023</u> DATE					<hr/> MELISSA A. CRANE, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE