

**Miller v Mount Sinai St. Luke's**

2023 NY Slip Op 32892(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 158215/2018

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

*Justice*

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CORTNIE L. MILLER,

Plaintiff,

- v -

MOUNT SINAI ST. LUKE'S, MOUNT SINAI WEST, and  
MOUNT SINAI HEALTH SYSTEM, INC.

Defendant.

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**INDEX NO.** 158215/2018

**MOTION DATE** 05/05/2023

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50 were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants move to enforce an order dated October 13, 2020 (Rakower, J.) and thereupon to dismiss the complaint with prejudice. The plaintiff does not oppose the motion. The motion is granted, and the complaint is dismissed with prejudice.

The plaintiff, then represented by counsel, commenced this action on September 4, 2018. The defendants answered the complaint on November 9, 2018. On August 15, 2019, the defendants moved pursuant to CPLR 3126 to dismiss the complaint for the plaintiff's failure to respond to their demands for discovery and a bill of particulars or, alternatively, to compel her to provide the outstanding discovery lest she be precluded from offering testimony at trial. The motion initially was adjourned from September 4, 2019 until October 2, 2019. During the pendency of the defendants' motion, the plaintiff's counsel moved to be relieved as her attorney, and a return date for that motion was scheduled for October 29, 2019.

In an order dated October 8, 2019, the court (Rakower, J.) granted the defendants' motion to the extent that the plaintiff was directed to produce all outstanding discovery within 30

days of that order, and all parties were directed to appear for a preliminary conference on December 3, 2019. In an order dated October 29, 2019, the same court relieved the plaintiff's counsel from its obligation of representation, stayed the case 60 days to give the now pro se plaintiff the opportunity to retain new counsel, and adjourned the preliminary conference until January 7, 2020.

The plaintiff appeared pro se at the January 7, 2020 preliminary conference, at which the court (Rakower, J.) established a discovery schedule directing the pro se plaintiff to serve all outstanding items of discovery and a bill of particulars by February 11, 2020, and submit to deposition on or before February 28, 2020. Notwithstanding these deadlines, a compliance conference was scheduled for February 4, 2020. In any event, the February 4, 2020 compliance conference was adjourned to March 17, 2020, but that conference was unable to proceed because the courts were closed as of that date due to the COVID-19 pandemic.

On September 11, 2020, and thus after the courts reopened for justices and judicial staff, the defendants requested the court to conduct a virtual compliance conference. Justice Rakower scheduled a virtual compliance conference for September 16, 2020, at which the defendants, but not the plaintiff, appeared. The plaintiff did, however, email the court and the defendants' counsel prior to the scheduled conference, explaining that she had not been able to obtain new counsel and had been unable to comply with the defendants' discovery requests. Specifically, she wrote: "I also recognize that proceeding on a pro se basis will no longer be tenable. If the Court deems that my lack of compliance means that I have to drop the action, I am willing to accept the consequences."

In a compliance conference order dated September 16, 2020, the court (Rakower, J.) directed the parties to appear for a discovery conference on September 30, 2020, and cautioned that the plaintiff's failure timely to respond to the defendants' outstanding discovery or appear at the September 30, 2020 conference might result in dismissal of the complaint. The parties appeared for a virtual conference before Justice Rakower on September 30, 2020, after

which she issued a second compliance conference order, this time directing the plaintiff to appear for an abbreviated virtual deposition within 30 days, and the parties to appear for a virtual status conference on November 4, 2020. In response to that order, the defendants noticed the plaintiff to appear for a virtual deposition to be conducted on October 14, 2020, but the plaintiff indicated to the defendants prior to that date that she was unwilling to go forward.

The parties thus appeared virtually before Justice Rakower on October 13, 2020, at which time she gave the plaintiff the option to proceed with the action or have the complaint dismissed. The plaintiff elected dismissal of the complaint. Consequently, in an order dated October 13, 2020, Justice Rakower directed the dismissal of the complaint without prejudice, and gave the plaintiff the opportunity to restore the action to active status and reinstate the complaint within one year, upon the affirmation of a medical expert who attested to the merits of her claims. Alternatively, the October 13, 2020 order provided that, if the action had not been restored within one year after service of a copy of the order with notice of entry, the defendants could move for the entry of a judgment dismissing the complaint with prejudice. On October 26, 2020, the defendants served the plaintiff, by certified mail, return receipt requested, with a copy of the October 13, 2020 order with notice of entry.

As of October 26, 2020, all service and filing deadlines had been tolled until November 3, 2020 (see Executive Law § 29-a; Executive Orders 202.8, 202.67; *Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021]). The plaintiff thus had until eight days after October 26, 2021, or until November 3, 2021, within which to seek to reinstate the complaint and restore the action. She did not avail herself of this opportunity.

The defendants thus now move to enforce the October 13, 2020 order and thereupon to dismiss the complaint with prejudice. The defendants established that the conditions necessary to the enforcement of that order have been satisfied and that a sufficient period of time has elapsed since the entry of that order to permit them to seek dismissal with prejudice.

Accordingly, it is

ORDERED that the defendants' motion is granted, without opposition, and the Clerk of the court shall enter judgment in favor of the defendants, Mount Sinai St. Luke's, Mount Sinai West, and Mount Sinai Health System, Inc., and against the plaintiff, Cortnie L. Miller, dismissing the complaint with prejudice insofar as asserted against each of them.

This constitutes the Decision and Order of the court.

8/21/2023  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: