

Furey v Haq

2023 NY Slip Op 34104(U)

November 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 9240/2013

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 15 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of November 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
DONALD FUREY and GLADYS FUREY,

Plaintiffs,

-against-

INAM-UL HAQ, M.D. and LASER AND VARICOSE VEIN
TREATMENT CENTER OF STATEN ISLAND, LLP, d/b/a
LASER AND VARICOSE VEIN TREATMENT CENTER and
STEPHEN BERMAN, R-PA,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

DECISION & ORDER

Index No. 9240/2013
Mo. Seq. 16 & 17

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s:

Seq. 16: 2 – 3, 4 – 59, 60 – 61, 105 – 106, 107 – 109, 120 – 121

Seq. 17: 63 – 64, 65 – 98, 99 – 101, 110 – 111, 112 – 114, 115, 116 – 117, 118 – 119

Defendant Inam-Ul Haq, M.D. moves pursuant to CPLR 3212(a) for summary judgment and dismissal of the complaint and moves to extend the time to move for summary judgment. Defendant Laser and Varicose Vein Treatment Center of Staten Island, LLP, d/b/a Laser and Varicose Vein Treatment Center moves pursuant to CPLR 3212 for a judgment declaring the matter abandoned as to them. Plaintiff opposes the motion of Defendants. Plaintiff's papers filed in sur-reply to movants' are rejected, as this Court accepts neither sur-replies nor surresponses.

Defendant Stephen Berman, R-PA moves pursuant to CPLR 3212(a) for summary judgment and dismissal of the complaint and moves to extend the time for Defendant to move for summary judgment. Plaintiff opposes the motion of Defendant.

Defendants' motions for summary judgment were filed more than 60 days after the Note of Issue as Plaintiff's Note of Issue was filed on August 30, 2017.

Plaintiff commenced this medical malpractice action by filing a Summons and Complaint on May 16, 2013; Dr. Haq Answered on July 16, 2013, and PA Berman Answered on August 12, 2013; Dr. Haq and PA Berman were served with the Bill of Particulars in October 2014. A preliminary conference was held on October 23, 2015, which set an assortment of deadlines for discovery obligations: Plaintiff and Plaintiff's spouse were to have EBTs completed on or before (hereinafter "oob") January 22, 2016, Dr. Haq's to be completed oob February 19, 2016, and PA Berman's oob March 11, 2016. On February 2, 2016, parties stipulated to extend those deadlines until the end of May 2016, and file a Note of Issue by July 1, 2016. Plaintiff filed a Note of Issue on December 28, 2016.

On January 10, 2017, Dr. Haq moved the Court to vacate the Note of Issue, as no EBTs had been completed. On January 31, 2017, the Court vacated the Note of Issue, and ordered relevant EBTs to be completed by May 31, 2017. Plaintiff again filed a Note of Issue on August 30, 2017, and Dr. Haq moved to vacate it on September 8, 2017, as EBTs had not been completed, and other discovery remained outstanding. On September 25, 2017, the Court did not vacate the Note of Issue, kept the case on the trial calendar, ordered relevant party EBTs, including both Plaintiff's and Dr. Haq's, to be completed by January 12, 2018, and indicated that the summary judgment motions were to be filed by June 12, 2018. On June 12, 2018, Dr. Haq filed a motion to extend the time to move for summary judgment, as the EBT of Dr. Haq and PA Berman had not yet been completed. On July 12, 2018, the Court ordered EBTs of named Defendants to be completed by September 14, 2018, and the time to move for summary judgment was extended until November 30, 2018. On November 16, 2018, the Court ordered EBTs of named Defendants to be completed by January 16, 2019, and extended the deadline for summary judgment until April 16, 2019.

On March 7, 2019, Dr. Haq filed a motion to extend the time to move for summary judgment, as party depositions had not yet been completed. On December 12, 2019, the Court extended discovery, directing Plaintiff to provide lien information within 30 days, and ordered parties to appear in Central Compliance Part on March 23, 2020. The order from February 2020 (NYSECF 36) is unreadable. Reviewing correspondences between counsel, as of December 7, 2022, Dr. Haq was awaiting lien information and confirmation as to whether Plaintiff intended to conduct an EBT of any additional nonparty witnesses.

EBT of Dr. Haq was conducted on November 15, 2018, and was completed on July 23, 2019. EBT of PA Nida Choudhry, witness for Laser and Varicose Vein Treatment Center, was completed on March 18, 2021. EBT of PA Berman was completed on March 5, 2020. EBT of Plaintiff Donald Furey was conducted on March 3, 2017, and completed on January 26, 2018. EBT of Plaintiff's spouse, Gladys Furey, was completed on January 26, 2018. The most recent Note of Issue was filed on August 30, 2017. On April 16, 2019, the Court denied Defendants' request to extend the summary judgment deadline, with leave "to renew before the IAS judge pursuant to *Brill*."

Dr. Haq moved for summary judgment on May 1, 2023. PA Berman moved for summary judgment on July 18, 2023.

Defendants argue that good cause exists to excuse the belated filing of his motion for summary judgment in light of *Brill*. Principally, the existence of unresolved discovery as of 2021, including *inter alia*, an *Arons* authorization, updated insurance lien letters, pharmacy information, updated authorizations, and a supplemental Bill of Particulars as to special damages, all frustrated the ability of Defendants to move for summary judgment. Plaintiff argues that Defendants do not have good cause under *Brill* and its progeny to excuse their tardy filing, especially as the last party-EBT was conducted in March of 2021.

The expeditious resolution of litigation, while remaining in compliance with applicable rules and case-specific orders, is of paramount importance, including resolution by way of summary proceedings. “The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution.” *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]. “If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999].

The CPLR states: “Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the Note of Issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown.” CPLR 3212. To wit, local Kings County Supreme Court rules advises that “motions for summary judgment may be made no later than 60 days after the filing of a Note of Issue... [T]he above time limitation may only be extended by the Court upon good cause shown.” NY R L KINGS Pt. C, Rule 6. The Individual Part Rules for the undersigned state: “A motion for summary judgment shall be made no later than sixty (60) days after filing the Note of Issue, except with leave of Court on good cause shown pursuant to *Brill* or by Stipulation of all parties.” Hon. Consuelo Mallafre Melendez, Part Rules, NY R KINGS, Part Rules (Mckinney).

Here, this Court’s “refusal to countenance the statutory violation” of Defendants’ failure to move for summary judgment within the prescribed timeframe, or even within 60 days of the completion of party EBTs, mandates that this Court will not entertain Defendants’ summary judgment motions. *Brill v City of New York*, 2 NY3d 648, 653 [2004].

Although “[s]ignificant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment,” such that outstanding discovery “be relevant to resolving disputed issues of fact,” here there was no outstanding discovery that would justify Defendants’ delay in waiting to make the motion in May of 2023 (Dr. Haq’s), let alone July of 2023 (PA Berman’s). *Avezbakiyev v City of New York*, 104 AD3d 888, 888 [2d Dept 2013]; *Fuczynski v 144 Div., LLC*, 208 AD3d 1153, 1155 [2d Dept 2022]. The burden is on the movant to demonstrate the existence of good cause: “It is up to the litigant to show the court why the rule should be flexible in the particular circumstances, or, in the words of the statute, that there is ‘good cause shown’ for the delay.” *Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 86 [1st Dept 2013]. In the instant case, information related to Medicare and Medicaid liens, pharmacy information, updated authorizations, a supplemental bill of particulars, a settlement demand, and deposition of non-party witnesses, including technicians in Dr. Haq’s clinic, were all not demonstrated to have been reasonably expected to yield information that was “essential” to the Defendants’ motions; furthermore, while not necessarily dispositive, Defendants have not demonstrated that the produced discovery was actually essential, or even used, in advancing their summary judgment motions, i.e. Medicare lien information was not used (or even relevant) to advance their argument that Dr. Haq’s actions were in conformance with the standard of care. “While significant outstanding discovery may, in certain circumstances, constitute good cause for a delay in making a motion for summary judgment, the movant must establish that the discovery was ‘essential to its motion.’” *Ragoonanan v 43-25 Hunter, LLC*, 214 AD3d 831, 832 [2d Dept 2023] quoting *Navarro v Damac Realty, LLC*, 202 AD3d 1100, 1101 [2d Dept 2023] [internal quotation marks, citations, references, and alterations omitted]. Furthermore, the most recently named party-EBT was of PA Berman, completed on March 5, 2020, meaning that three years lapsed until Defendants moved for summary judgment, and counsel had not promptly sought an extension in the interim. See *Greenpoint Properties, Inc. v Carter*, 82 AD3d 1157 [2d Dept 2011]; *Ragoonanan v 43-25 Hunter, LLC*, 214 AD3d 831 [2d Dept 2023]; compare “fact that the deposition of a nonparty witness remained outstanding when the Note of Issue was filed does not constitute good cause in this case, as they failed to move for summary judgment until approximately 2 1/2 months after the deposition was held,” *Torres v Serlin Bldg. Ltd. Partnership*, 208 AD3d 1195, 1196 [2d Dept 2022]. Although the Court is cognizant of the intervening pandemic and the challenges wrought by its disruptions, the Court cannot sanction a three-year delay. Compare *Gibson, Dunn & Crutcher LLP v D’Anna*, 212 AD3d 438 [1st Dept 2023] (excusing a one month delay due to the pandemic); See also *V. v Leo*, 219 AD3d 961 [2d Dept 2023]. Moreover, as of the first quarter of 2023, no discovery the parties themselves were seeking would justify waiting until May and July of 2023 to move for summary judgment as to the negligence elements of the claim (duty, breach, causation, injury). “Thus, for summary judgment purposes, the delay occasioned by the [litigant’s] alleged need to conduct further discovery did nothing to resolve any disputed issues of fact

as to [a material fact of the litigation].” *Johnson v Peconic Diner*, 31 AD3d 387, 388 [2d Dept 2006]. Finally, Dr. Haq claims that this case is similar to *Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803 [2d Dept 2009], where the Appellate Division reversed Supreme Court and granted leave to extend the time to move for summary judgment by 120 days, as the Plaintiff had not provided authorizations for pertinent medical records, and there were significant and disputed questions surrounding Plaintiff’s premorbid condition and diminution thereof. Unlike *Abdalla*, here the outstanding discovery was not demonstrated to be material to Defendants’ summary judgment motion, and the instant motion was made over *two years* after necessary discovery was obtained.

Defendants do not tender any explanation why they had not sought leave of the Court for an extension of the summary judgment deadline while awaiting “necessary” discovery in the two-year period between 2021 and 2023. *Cf.* “[E]ven following the completion of the deposition, the plaintiff did not promptly seek an extension and failed to articulate any reason for his delay of approximately two months in moving for summary judgment after the deposition.” *Ragoonanan v 43-25 Hunter, LLC*, 214 AD3d 831, 832 [2d Dept 2023].

“Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated.” *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterrra Assoc.]*, 5 NY3d 514, 521 [2005].

In light of the Court’s determination that each Defendants’ summary judgment motion is untimely, the Court will not consider the merits of the motions.

Accordingly, Defendants’ motion pursuant to CPLR 2004 to extend the time for Defendants to move for summary judgment and pursuant to CPLR 3212(a) for summary judgment and dismissal of the complaint are Denied.

This constitutes the decision and order of the Court.¹

ENTER.



Hon. Consuelo Mallafre Melendez

J.S.C.

¹ This decision was drafted with the assistance of legal intern Alexander Weller, MD, Brooklyn Law School.